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13 **UNITED STATES DISTRICT COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**  
15

16 KEVIN RISTO, on behalf of himself and  
17 all others similarly situated,

18 Plaintiff,

19 v.

20 SCREEN ACTORS GUILD-  
AMERICAN FEDERATION OF  
21 TELEVISION AND RADIO ARTISTS,  
a Delaware corporation; AMERICAN  
22 FEDERATION OF MUSICIANS OF  
THE UNITED STATES AND  
23 CANADA, a California nonprofit  
corporation; RAYMOND M. HAIR, JR,  
24 an individual, as Trustee of the AFM and  
SAG-AFTRA Intellectual Property  
25 Rights Distribution Fund; TINO  
GAGLIARDI, an individual, as Trustee  
of the AFM and SAG-AFTRA  
26 Intellectual Property Rights Distribution  
Fund; DUNCAN CRABTREE-  
IRELAND, an individual, as Trustee of  
27 the AFM and SAG-AFTRA Intellectual  
28

**CASE NO. 2:18-CV-07241-CAS-PLA**  
**CLASS ACTION**

**PLAINTIFF'S NOTICE OF  
MOTION AND MOTION IN  
LIMINE NO. 2 TO EXCLUDE ANY  
MENTION, REFERENCE, OR  
EVIDENCE RELATED TO  
DEFENDANTS' 50 SONG STUDY;  
DECLARATION OF NICO L.  
BRANCOLINI IN SUPPORT  
THEREOF**

Judge: Hon. Christina A. Snyder  
Crtrm.: 8D – 8th Floor

Date: July 19, 2021  
Time: 11:00 a.m.

Trial Date: August 17, 2021

1 Property Rights Distribution Fund;  
2 STEFANIE TAUB, an individual, as  
3 Trustee of the AFM and SAG-AFTRA  
4 Intellectual Property Rights Distribution  
5 Fund; JON JOYCE, an individual, as  
6 Trustee of the AFM and SAG-AFTRA  
7 Intellectual Property Rights Distribution  
8 Fund; BRUCE BOUTON, an individual,  
9 as Trustee of the AFM and SAG-  
10 AFTRA Intellectual Property Rights  
11 Distribution Fund; and DOE  
12 DEFENDANTS 1-10,

13 Defendants.

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1                   **TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS**  
2                   **OF RECORD:**

3                   **PLEASE TAKE NOTICE** that on July 19, 2021, at 11:00 a.m., or as soon  
4 thereafter as the matter can be heard in Courtroom 8D of this Court, located at First  
5 Street Courthouse, 350 W. First Street, 8th Floor, Los Angeles, California 90012,  
6 Plaintiff Kevin Risto will and hereby moves the Court for an order to preclude  
7 Defendants from referencing, mentioning, or seeking to introduce evidence related to  
8 the 50 Song Study referenced in David Nolte's expert report, the April 23, 2021 Sandell  
9 Declaration and produced as bates stamped document DEFS\_00042027.

10                  Plaintiff further moves the Court to instruct the parties and their counsel of the  
11 following:

12                  1. Not to reference, mention, or seek to introduce evidence related to the 50  
13 Song Study and DEFS\_00042027.

14                  2. Not to make any reference to the fact that this Motion *in Limine* has been  
15 filed and/or granted; and

16                  3. To warn and caution each and every witness to strictly adhere to the same  
17 instructions.

18                  This Motion is made following a conference of counsel pursuant to L.R. 7-3 and  
19 L.R. 16-2, which took place on June 9, 2021.

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1        This Motion is based on this Notice of Motion and Motion, the attached  
2 Memorandum of Points and Authorities, the Declaration of Nico L. Brancolini and any  
3 supporting exhibits filed concurrently therewith, all pleadings and other papers on file  
4 with the Court in this matter, and any additional evidence and oral argument that may  
5 be presented at the hearing on this Motion.

6

7 DATED: June 21, 2021

KIESEL LAW LLP

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By: /s/ Nico L. Brancolini

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Paul R. Kiesel

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Mariana A. McConnell

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Nico L. Brancolini

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**KIESEL LAW LLP**

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Neville L. Johnson

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Daniel Lifschitz

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**JOHNSON & JOHNSON LLP**

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*Attorneys for Plaintiff and the Class*

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Included in Mr. Nolte's Rule 26(a)(2)(B) expert report was a discussion of a study conducted by Fund personnel to identify the role that Union data played in ensuring the accuracy of performer royalty allocations. *See Declaration of Nico L. Brancolini ("Brancolini Decl.") Ex. 1, Mr. Nolte's Expert Report, p.11.* For this study 50 songs were researched by Fund personnel who compared Union performer data on those tracks with performer data from other publicly available sources. This research, catalogued in a spreadsheet by the Fund and produced as bates stamp DEFS\_00042027, was then cited by Mr. Nolte to conclude that the Unions' data was more accurate than publicly available sources. Brancolini Decl., Ex. 2, DEFS\_00042027. He further used the study and findings as a significant factor in his conclusion that absent the Service Agreement, "the Fund would not be able to make payments to participants that are as accurate and complete as what is now occurring." But these sweeping pronouncements and grand conclusions are totally incongruous with the 50 Song Study's accuracy or relevancy. Mr. Nolte's report is a Trojan Horse for a fatally flawed and highly prejudicial study – which is in reality nothing more than a piece of agitprop created by a lay witness lacking the requisite expertise and ability to create a representative sample – smuggled in under the edifice of Nolte's expert designation.

20 Fund manager Julie Sandell is not qualified to testify to the foundation of the 50  
21 Song Study. Despite having no background in statistics, Ms. Sandell appears to have  
22 developed the 50 Song Study for its specialized technical purpose. ECF No. 108, ¶¶  
23 7,8. Unsurprisingly, given her lack of qualifications or designation, the genesis  
24 and methodology of the study has no basis in sound statistical principles – and in fact –  
25 the selection process appears to have been contrary to accepted practices.

26 Mr. Nolte theoretically may have been qualified to work with Ms. Sandell and  
27 develop a statistically useful study, but as Mr. Nolte repeatedly made clear he was not  
28 involved in the process. Brancolini Decl., Ex. 3, Nolte Dep., 117:16-118:15, 130:2-

1 131:25. “Reliance on incomplete facts and data will make an expert’s opinion  
2 unreliable because an expert must know “of facts which enable him to express a  
3 reasonably accurate conclusion.” *Powell v. Anheuser-Busch Inc.*, No. CV 09-729-JFW  
4 (VBKx) 2012 U.S. Dist. LEXIS 200311, at \*18 (C.D. Cal. Sep. 24, 2012) (internal  
5 citation omitted).

6       The Study’s core analysis is broadly unrelated to the main issues of this case.  
7 This deeply flawed, inscrutable, and irrelevant study does nothing to assist the trier of  
8 fact and is likely to cause confusion and delay if included at trial. For all the reasons  
9 set forth herein, any mention or reference to the 50 Song Study should be excluded.

10 **II. FACTUAL BACKGROUND**

11       In February of 2019, Plaintiff propounded an interrogatory asking Defendants  
12 “If YOU contend that the SERVICE FEE is a reasonable charge for the services  
13 provided by the UNIONS, state ALL facts that support that contention.” Brancolini  
14 Decl., Ex. 4, Interrogatory No. 10, p. 8. Throughout the fall and winter of 2020 Plaintiff  
15 took depositions of a number of fact witness, including Ms. Sandell, who when asked  
16 questions about the sources of information utilized by Fund researchers were told  
17 identifying individual sources was not possible. Brancolini Decl. Ex. 5, Sandell Dep.<sup>1</sup>  
18 At no point during discovery did Defendants disclose or produce the 50 Song Study.

19       Plaintiff first learned of the 50 Song Study when Defendants served their expert  
20 report of David Nolte on March 8, 2021. In his report Mr. Nolte wrote that the study  
21 was supposed to demonstrate what would occur if the Fund did not have access to the  
22 Unions’ data and instead tried to locate performer data from non-Union sources. Ex. 2,

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23  
24 <sup>1</sup> See e.g. Brancolini Decl., Ex. 5 73:11-24:

25 “Q. You told us about the different sources that the Fund can look at to identify  
26 nonfeatured performers on tracks, and I’m wondering has anyone ever asked you to  
27 segregate whether the Fund has identified a performer due to something that the union  
28 has provided the Fund, as opposed to an online resource like Discogs or ALLMusic?  
A. Well, that would be too time consuming. It wouldn’t be worth it.  
Q. Why wouldn’t it be worth it?

A. Because our objective is to research the title correctly to the best of our ability and  
get it as right as right can be with all of our sources. We don’t really think about it that  
way.”

1 p. 8. The “Fund selected 50 titles in a manner that the Fund described as random” and  
2 were selected from a list of songs that all shared two attributes: “(i) had distributions  
3 in 2020 and (ii) had Union session reports.” *Id.* at FN 12, p. 11. Fund researchers then  
4 consulted various alternative sources of performer data and compared the accuracy of  
5 the publicly available data with the Unions’ data.

6 From this process, Mr. Nolte concluded that the Unions’ data was more accurate  
7 than the free publicly available data Fund researchers consulted. As stated more fully  
8 in Plaintiff’s Motion in Limine #1, after taking the deposition of Mr. Nolte, it became  
9 apparent that Ms. Sandell was the primary architect of the Study.

10 Defendants relied upon the 50 Song Study in their Motion for Summary  
11 Judgment which included a declaration from Ms. Sandell confirming her role in  
12 developing and managing the study. ECF Nos. 103, 104, 108. Ms. Sandell does not  
13 have any background in statistics or accounting. Ex. 5, 31:24-32:15. Ms. Sandell  
14 explained that she directed and completed this project over January and February of  
15 2021<sup>2</sup>. ECF No. 108 ¶¶ 2, 7. Therefore, this project appears to have begun after Ms.  
16 Sandell testified that this sort of project would not be consistent with the actual research  
17 process used by Fund researchers. Ex. 5, 73:11-24.

18 On June 14, 2021 this Court granted leave to re-open Ms. Sandell’s deposition  
19 on the topic of the 50 Song Study. ECF No. 119, FN 1, p. 2-3. That same morning  
20 Plaintiff’s counsel reached out to Defendants’ counsel to schedule Ms. Sandell’s  
21 testimony ahead of the motion in limine deadline. Brancolini Decl., Ex. 7. Instead,  
22 defense counsel offered a date after the motion deadline, refusing to extend the deadline  
23 for filing this motion and summarily declaring that this motion was moot. Plaintiff has  
24 no choice but to file this motion and supplement the record once the deposition of Ms.  
25 Sandell is complete. Brancolini Decl., Ex. 8.

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28 <sup>2</sup> Mr. Nolte’s invoices going back to early January also reference the 50 song study and  
revisions to it. Brancolini Decl., Ex. 6 Fulcrum Invoices.

1 **III. LEGAL STANDARD**

2 “Irrelevant evidence is not admissible.” Fed. R. Evid. 402. Evidence is only  
3 relevant “if it has any tendency to make a fact more or less probable than it would be  
4 without the evidence” and “the fact is of consequence in determining the action.” Fed.  
5 R. Evid. 401. Even if proffered evidence is relevant, the Court may nevertheless  
6 exclude it “if its probative value is substantially outweighed by the danger of ...  
7 confusion of issues or misleading the jury.” *U.S. v. Moreno*, 201 F.3d 994, 998 n.3 (9th  
8 Cir. 1996) (citing Fed. R. Evid. 403) (“The court may exclude relevant evidence if its  
9 probative value is substantially outweighed by danger of one or more of the following:  
10 unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time,  
11 or needlessly presenting cumulative evidence.”).

12 Unless offering expert testimony under Rule 703, a witness can only testify to  
13 matters for which he or she has personal knowledge. Fed. R. Evid. 602, 703. Lay  
14 opinion testimony **must** be: “(a) rationally based on the witness’s perception; (b)  
15 helpful to clearly understanding the witness’s testimony or to determining a fact in  
16 issues; and (c) **not based** on scientific, technical, or other specialized knowledge within  
17 the scope of Rule 702.” Fed. R. Evid. 701 (emphasis added).

18 One of the principle tasks of Rule 702 of the Federal Rules of Evidence is  
19 “ensuring that an expert’s testimony both rests on a reliable foundation and is relevant  
20 to the task at hand.” *Daubert v. Merrell Dow Pharmas. Inc.*, 509 U.S. 579, 597 (1993).  
21 The purpose of the prohibition of lay testimony requiring scientific, technical, or  
22 specialized knowledge is “to prevent litigants from skirting the *Daubert* standard or  
23 the expert disclosure guidelines by introducing expert opinion testimony as lay opinion  
24 testimony.” *Hynix Semiconductor Inc. v. Rambus Inc.*, No. C-05-00334 RMW, 2008  
25 U.S. Dist. LEXIS 16716, at \*30 (N.D. Cal. Feb. 19, 2008) (citing FRE 701, adv.  
26 committee note (2000)).

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1 **IV. ARGUMENT**

2 **A. The 50 Song Study Is Unreliable and Testimony on it From Either Ms.  
3 Sandell or Mr. Nolte is Barred Under the Federal Rules of Evidence**

4 **i. There is no evidence that the 50 song study utilizes a reliable sample size**

5 As an initial matter it is not at all clear that the sample size of 50 songs was large  
6 enough to be useful or reliable for any of the conclusions for which it is presented. “In  
7 order to draw reliable conclusions about a population based on a statistical sample, the  
8 sample size must be large enough to support those conclusions.” *In re Countrywide*  
9 *Fin. Corp. Mortgage-Backed Secs. Litig. v. Countrywide Fin. Corp.*, 984 F. Supp. 2d  
10 1021, 1033 (C.D. Cal. 2013). “Statistical evidence derived from an extremely small  
11 universe...has little predictive value and must be disregarded.” *Morita v. Southern Cal.*  
12 *Permanente Med. Group*, 541 F.2d 217, 220 (9th Cir. 1976) (quoting *Harper v. Trans*  
13 *World Airlines, Inc.*, 525 F.2d 409, 412 (8th Cir. 1975)).

14 Neither Ms. Sandell nor Mr. Nolte provided any evidence that they determined  
15 50 titles was a large enough sample size to be reliable or predictive. When asked, Mr.  
16 Nolte did not appear to have a clear idea of what the overall population was that the  
17 50 songs were selected from. The songs were apparently selected from a list of 5,992  
18 tracks for which the Fund had Union data and were distributed on in 2020. However,  
19 Mr. Nolte had no idea how this universe of songs connected to the broader universe  
20 of tracks distributed in 2020, could not say if the 5,992 songs represented all the songs  
21 that met those two criteria, nor how many songs met one or both of the mentioned  
22 criteria, or how the year 2020 was selected over any other. Ex. 3, 137:4-142:22. Since  
23 Nolte did not know these things when he drafted his report, he had no way of  
24 knowing if the study was representative. Therefore none of his conclusions related to  
25 the 50 song study can credibly be called reliable.

26 **ii. The 50 song study requires a degree of specialized knowledge not  
27 possessed by Ms. Sandell**

28 Under Rule 702, expert “reports describing the statistical sampling

1 methodologies must be authored by a qualified expert witness, reliably apply scientific  
2 methods to sufficient data, and be helpful to the trier of fact.” *In re Countrywide Fin.*  
3 *Corp. Mortgage-Backed Secs. Litig. v. Countrywide Fin. Corp.*, 984 F.Supp.2d 1021,  
4 1027 (C.D. Cal. 2013).

5 Here, the person who prepared the statistical model for the 50 song study, Ms.  
6 Sandell, is neither offered nor qualified as an expert in statistical analysis. Testimony  
7 from Defendants’ actual designated expert confirms the degree to which specialized  
8 knowledge would be needed. Mr. Nolte explained as a general principle the necessity  
9 of random and representative samples in statistical modeling. Ex. 3, 118:22-121:8. He  
10 expounded at great length on the role of both in drawing statistical inferences in terms  
11 of precision and confidence levels.

12 As described both in Mr. Nolte’s report and Ms. Sandell’s declaration, nothing  
13 indicates that the selection process was devised to be representative or random. The  
14 sampling process was described as “generating a list of 5,992 covered recordings that  
15 (i) were subject to royalty distributions in 2020; and (ii) had Union session reports”  
16 and then Ms. Sandell started “approximately halfway down the list, and then selected  
17 the largest 50 of the next 100 sequential titles.” ECF No. 108, ¶ 8. This raises various  
18 questions, the answers to which will necessarily impact how random or representative  
19 (and therefore reliable) the results of this selection process were.

20 For example: was 5,992 the total number of songs that met the two criteria? If  
21 not, how many songs did? And how then were the 5,992 selected from that full list?  
22 How were the 5,992 songs ordered? What does approximately halfway down mean?  
23 Were the songs selected representative of the genre/style/year release of the overall  
24 songs within the total sample group? How does 2020 compare to other distribution  
25 years? What does “largest” mean? More troubling, things like the decision to select the  
26 “largest 50 of the next 100” is a decision that can is likely to make the sample *less*  
27 random and representative of the overall set.

28 / / /

1        **iii. Mr. Nolte cannot give testimony on a study he had no role in devising**

2            The court, as the gatekeeper, “is to make certain that an expert, whether basing  
3 testimony upon professional studies or personal experience, employs in the courtroom  
4 the same level of intellectual rigor that characterizes the practice of an expert in the  
5 relevant field.” *Kumho Tire Co. LTD. v. Carmichael et al.* 526 US 137, 152 (1999).

6            Since Ms. Sandell could not and did not create a reliable data set, Mr. Nolte  
7 cannot express any reasonably accurate conclusions based off of it. When specifically  
8 discussing the 50 song study, Mr. Nolte attempted to both limit the scope of his  
9 conclusions and insist that the Fund “indicated that in their mind it was random [sample  
10 selection] and... sufficiently large to accomplish its purpose.” Ex. 3, 123:1-11. Mr.  
11 Nolte claimed that you can still “extrapolate” some results he just has “not expressed  
12 anything with the precision and confidence level.” *Id.* at 123:12-21. In effect, Mr. Nolte  
13 is saying that he was able to draw some conclusions he just won’t say whether they are  
14 accurate or useful conclusions.

15           Despite Mr. Nolte’s efforts to obscure the issue it is obvious that Defendants are  
16 attempting to use the imprimatur of their expert’s credentials to launder in a  
17 methodologically flawed study. This becomes particularly clear in the context of the  
18 conclusions and calculations Mr. Nolte makes as to allocation error rate based on the  
19 50 song study. While Mr. Nolte may be qualified to calculate a simple error rate, Mr.  
20 Nolte is not qualified or permitted to draw conclusions from an inadmissible sample  
21 he did not participate in, direct, and has no knowledge of. *Snyder v. Bank of Am., N.A.*,  
22 2020 U.S. Dist. LEXIS 206437 at \*19 (N.D. Cal. Nov. 3, 2020). Despite insisting in his  
23 deposition that he’s “not reached any conclusion regarding the [study] being  
24 representative” he still attempts to use the study to support the claim that the Unions  
25 prevent \$34.5-\$115 million worth of misallocations. Ex. 1, p. 18.

26           Ms. Sandell is not qualified to create this sort of study and all available evidence  
27 was that she did not make a study that is of any statistical value. Lacking this  
28 foundation, Mr. Nolte’s calculations based on that study are not reliable. Plaintiff

1 therefore urges this Court to exclude the resultant unreliable and prejudicial testimony  
2 and conclusions.

3 **B. The 50 Song Study Is Not Admissible Under Federal Rules 401 – 403**

4 **i. The study is irrelevant to the process by which the Service Fee was adopted**  
5 **and if that process constituted a breach of the Trustees' fiduciary duties**

6 Plaintiff alleges that the process under which the Services Agreement was  
7 approved improperly favored the Unions. The Study continues Defendants' habit of  
8 focusing on the supposed intrinsic value of the data rather than the reasonableness of  
9 the fee itself. Plaintiff has never disputed that the data has some value – rather, he  
10 believes the process surrounding the adoption of the Service Fee was a cash grab by  
11 Fund Trustee Co-Chairs focused on extracting money from for the Unions, not  
12 meaningfully connected to the actual work the Unions were doing to support the  
13 Fund, and contrary to Copyright Act Section 114.

14 A study conducted in late 2020 or early 2021 that uses Union data as a baseline  
15 to “prove” that Union data is valuable does nothing to elucidate the evaluation or  
16 negotiation process that preceded the adoption of Services Agreement back in 2013.  
17 Even if the data was not available from any other source, a Services Agreement whose  
18 terms were overly favorable to the Unions would be improper and could constitute of  
19 breach of fiduciary duty. The Trustees still had an obligation, as this Court has noted,  
20 to administer the trust with “complete loyalty to the interests of the beneficiary and  
21 must exclude... all consideration of the interests of third persons.” *In re Northrop*  
22 *Grumman Corp. Erisa Litig.*, No. CV 06-06213 MMM (JCx), 2015 WL 10433713, at  
23 \*26 (C.D. Cal. Nov. 24, 2015).

24 **ii. The study is irrelevant as to either availability of comparable alternative**  
25 **data sources or the reasonableness of the Service Fee amount**

26 As described by Mr. Nolte the “purpose of the exercise was to ascertain what  
27 outcome would result if the Fund did not have the Unions’ data available.” Ex. 1, p.  
28 11. His report goes onto to explain that the exercise demonstrates the inferiority of

1 “Internet resources” and “publicly available, non-Union sources of information.” *Id.*

2 In other words, this study did not actually look at the availability of this data  
3 from alternative sources, it just looked at *free publicly available* alternative sources.  
4 However it does not make sense in the context of Plaintiff’s claims to only look at  
5 free, publicly available information. Putting aside the questions of accuracy,  
6 Defendants are essentially asking to use this study to state “since this information  
7 cannot be located free of charge, it must not exist anywhere else and it is therefore  
8 reasonable to pay the Unions whatever they want in exchange for this information.”

9 But the reality is this study did not look at the availability and accuracy of this  
10 information – let alone cost – from the other sources. Indeed, Defendants frequently  
11 evoke a section of the Trust Agreement which appears to authorize the Fund to  
12 “purchase or obtain from the AFM, SAG-AFTRA, the AFM and Employers’ Pension  
13 Fund, the AFTRA Health and Retirement Funds, the Phonograph Manufacturers’  
14 Special Payments Fund, the Motion Picture Special Payments Fund, or any [other]  
15 commercial source any data.” Brancolini Decl., Ex. 9, Trust Agreement p.5. This study  
16 did not look to any of these other sources, commercial or otherwise, to try and  
17 determine if the information was available. Notably absent from the resources  
18 consulted as part of the 50 song study was LexisNexis even though: (i) the Fund already  
19 has a paid subscription and (ii) it contains a database of contact information comparable  
20 to the one available through the Unions. A study purporting to demonstrate the  
21 availability and value of Union data should be looking at all these possible sources.

22 **iii. Further considerations of the Study’s circumstances and content would**  
23 **make its inclusion prejudicial to Plaintiff**

24 *First*, the Study was not disclosed in a timely manner. Defendants should not be  
25 allowed to rely on evidence or testimony related to that evidence which was not timely  
26 and properly disclosed pursuant to Rule 26 of the Federal Rules of Civil Procedure,  
27 this Court’s scheduling order, or through timely served discovery requests. *See* Fed. R.  
28 Civ. P. 37(c)(1) (“the party is not allowed to use that information or witness to supply

1 evidence on a motion, at a hearing, or at a trial, unless the failure was substantially  
2 justified or is harmless”).

3 Far from being harmless, Plaintiff first learned of the study from Mr. Nolte’s  
4 expert report after the close of fact discovery. However, by all indications the study  
5 was completed weeks before with both Ms. Sandell’s declaration and Mr. Nolte’s  
6 invoices indicating that the Study was completed by mid-February. Applying Occam’s  
7 Razor, this failure to disclose the Study during discovery, before Mr. Nolte’s report  
8 was produced, leaves Defendants’ conduct somewhere between improperly careless  
9 and outright malicious. To allow Defendants to offer or elicit testimony about an  
10 improperly disclosed study would be irreversibly prejudicial to Plaintiff and therefore  
11 should be excluded pursuant to Fed. R. Evid. 403. Such testimony would confuse the  
12 issues and mislead the Court into deciding the case based upon improper evidence. *Id.*

13 **Second**, Defendants’ testimony regarding the 50 Song Study is inadmissible  
14 because it would be confusing and unduly consume time, outweighing any probative  
15 value it may offer. Allowing Defendants to testify about the Study itself would require  
16 further testimony on numerous conjectural matters to resolve the issues of its accuracy  
17 and utility as presented. The minimal probative value of the Defendants’ testimony on  
18 the Study is substantially outweighed by the undue consumption of time, along with  
19 the danger that their speculative testimony will confuse the issues central to this case.  
20 Thus, the testimony should be excluded under Rule 403. As further outlined above, the  
21 accuracy and reliability of the study’s methodology is also in dispute, an issue  
22 compounded by having a non-expert witness develop a study that an expert later relies  
23 upon for analysis.

24 **V. CONCLUSION**

25 For the foregoing reasons, Plaintiff respectfully requests that the Court grant his  
26 Motion in Limine to Exclude Any Reference or Mention of the 50 Song Study and to  
27 preclude Mr. Nolte, Ms. Sandell, or anyone else from offering any opinions or  
28 testimony related to the study at trial.

1 DATED: June 21, 2021

KIESEL LAW LLP

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By: /s/ Nico L. Brancolini

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Paul R. Kiesel

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Mariana A. McConnell

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Nico L. Brancolini

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**KIESEL LAW LLP**

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Neville L. Johnson

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Daniel Lifschitz

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**JOHNSON & JOHNSON LLP**

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*Attorneys for Plaintiff and the Class*

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**DECLARATION OF NICO L. BRANCOLINI**

I, Nico L. Brancolini, hereby declare as follows:

3 1. I am an attorney at law, duly licensed to practice before all Courts in the State  
4 of California and the United States District Court for the Northern, Central and  
5 Southern Districts of California. I am an associate at Kiesel Law LLP, counsel for  
6 Plaintiff Kevin Risto and designated Class Counsel in the above-captioned action.

7 2. This Declaration is offered in support of Plaintiff's Motion in Limine No. 2 to  
8 exclude any reference, opinions, and testimony on Defendants' 50 Song Study. If  
9 called upon as a witness I could and would competently testify to the following based  
10 on personal knowledge.

11 3. The parties met and conferred as to the subject matter of this Motion pursuant to  
12 Local Rule 7-3 and Local Rule 16-2. The parties were unable to reach agreement,  
13 thereby necessitating this Motion.

14 | 4. Attached hereto as Exhibit "1" is a true and correct copy of David Nolte's March 8,  
15 | 2021 expert report.

16 5. Attached hereto as Exhibit "2" is a true and correct copy of the excel  
17 sheet documenting the 50 song study which was produced as bates stamped  
18 document DEFS 00042027 and provided with their expert report on March 8, 2021.

19 6. Attached hereto as Exhibit "3" is a true and correct copy of the deposition of  
20 David Nolte taken on April 27, 2021.

21 7. Attached hereto as Exhibit "4" is a true and correct copy of Plaintiff's First Set  
22 of Interrogatories to Defendants.

23 8. Attached hereto as Exhibit "5" are true and correct excerpts of the deposition  
24 of Julie Sandell taken on December 9, 2020.

25 9. Attached hereto as Exhibit "6" is a true and correct copy of Fulcrum's Invoices  
26 produced as bates stamped documents Defendants NOLTE00000001-4.

27 10. Attached hereto as Exhibit "7" is a true and correct copy of the email sent by  
28 Mariana A. McConnell to Defense counsel on June 14, 2021.

1 11. Attached hereto as Exhibit "8" is a true and correct copy of the emails exchanged  
2 between Ms. McConnell and Defense counsel on June 15-16, 2021.

3 12. Attached hereto as Exhibit "9" is a true and correct copy of the Agreement and  
4 Declaration of Trust for the AFM and SAG-AFTRA Intellectual Property Rights  
5 Distribution Fund, Amended and Restate July 26, 2012.

6 I declare under penalty of perjury under the laws of the United States of America  
7 that the foregoing is true and correct.

8 Executed June 21, 2021, at Beverly Hills, California.

9  
10 /s/ Nico L. Brancolini  
11 Nico L. Brancolini  
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# **EXHIBIT 1**



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March 8, 2021

Andrew J. Thomas, Esq.  
Andrew G. Sullivan, Esq.  
Jenner & Block LLP  
633 West 5th Street, Suite 3600  
Los Angeles, CA 90071-2054

Gentlemen:

This report is provided by Fulcrum Financial Inquiry LLP ("Fulcrum") in connection with the class action lawsuit brought by Kevin Risto, (as class representative - "Plaintiff") concerning the operation of the AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund (the "Fund"). The lawsuit is captioned *Risto v. Screen Actors Guild - American Federation of Television and Radio Artists, et al.*, (USDC, Central District of California, Case No. 2:18-cv-07241-CAS).

## **I. DESCRIPTION OF ENGAGEMENT**

Fulcrum has been asked to address the reasonableness of the amounts that the Fund pays to the American Federation of Musicians of the United States and Canada ("AFM") and Screen Actors Guild – American Federation of Television and Radio Artists ("SAG-AFTRA") (collectively, the "Unions") pursuant to the July 22, 2013 Data Purchase and Services Agreement (the "2013 Agreement"). This evaluation is economically and financially based, and does not address legal conclusions.

## **II. INFORMATION RELIED UPON**

In addition to my experience and training, I considered the following information in preparing this report, each of which is of a type that is reasonably relied upon by experts in my field:

1. Background information, as follows:
  - a. The First Amended Complaint in this matter
  - b. Plaintiff's Response to Interrogatories and Requests for Admission (February 12, 2021)
  - c. Filings associated with the Motion to Dismiss (and related Oppositions & Replies)
  - d. Filings associated with the Motion for Class Certification (and related Oppositions & Replies)
2. The 2013 Agreement
3. The Unions' interrogatory responses (aka Exhibit 5 to the Kristina Gorbacsov deposition) and the Unions' amended interrogatory responses (March 1, 2021)
4. The Fund's audited financial statements (aka Annual Reports) as of March 31, 2014, 2015, 2016, 2017, 2018 and 2019, and for the years then ended. These are publicly available at <https://www.afmsagaaftrafund.org/Our-Annual-Report.php>

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5. The following depositions taken in this matter, including related deposition exhibits
  - a. Stefanie Taub (Fund CEO), in an individual capacity, taken on October 20, 2020
  - b. Stefanie Taub as a designee witness for the Fund, taken on January 20, 2021
  - c. Kristina Gorbacsov, taken on October 23, 2020, as a designee witness for SAG/AFTRA
  - d. John Painting, taken on October 29, 2020, as a designee witness for AFM
  - e. Julie Sandell (Fund Assoc. Director, Sound Recordings), taken on December 9, 2020
  - f. Dennis Dreith (former Fund Executive Director), taken on February 11, 2021
  - g. Duncan Crabtree-Ireland, taken on February 16-17, 2021 (SAG/AFTRA)
  - h. Raymond M. Hair, Jr., taken on February 24-25, 2021 (AFM)
6. The Fund's review of a sample of 50 titles, with comparison of the results achieved using the Unions' data vs. using only data available on the Internet and from other non-Union sources, as contained in an MS Excel file. This file is further described in Sections III.E and Sections IV.B herein. The version of this spreadsheet provided to me by the Fund has been produced by Defendants as DEFS\_00042027. See Exhibit 2 for a version of this spreadsheet with changes that Fulcrum made to calculate an error rate.
7. Other records produced in this litigation, as specifically referenced herein
8. Publicly available data, as summarized and referenced herein

Fulcrum personnel reviewed and considered additional documents produced in this litigation that are not specifically cited in the conclusions expressed herein, but which provide background information and context. These additional records do not alter any of the conclusions expressed herein.

### **III. FACTUAL AND LEGAL BASIS FOR THIS REPORT AND THE OPINIONS HEREIN**

This section provides background information that is useful in understanding this report. Although Fulcrum is capable of summarizing information contained in this section and may need to do so as part of a testimony presentation, this report does not otherwise express opinions regarding the contents of this section.

In his response to Interrogatory No. 18 (February 12, 2021), Plaintiff states the following:

*"Facts: ...  
the Unions are unable to provide information for over 70% of the Fund's requests, which themselves only represent a fraction of the recordings tracked by the Fund. The time and cost to the Unions in providing this information to the Fund is de minimis. In addition, since the Fund has been compiling the information provided by the Unions at its own expense and effort, the Fund no longer has any use for the Unions' limited information for the vast majority of Fund beneficiaries."*

The information in this Section III contradicts the preceding quote from Plaintiff.

#### **A. Plaintiff's description of the statutory basis for collections and the 2013 Agreement**

The First Amended Complaint describes the background of this dispute as follows:

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"2. Under 17 U.S.C. § 114(g), 50% of digital performance royalties are payable to the copyright owners of the sound records, 45% are payable to the featured artists, 2.5% are payable to the non-featured musicians (also known as session musicians) and 2.5% are payable to the non-featured vocalists (also known as session vocalists) (collectively referred to herein as "non-featured performers") ...

4. The statute requires payment of the Royalties to non-featured performers regardless of their union membership in any or all of the three major unions: the American Federation of Musicians of the United States and Canada ("AFM"), or SAG-AFTRA (the surviving entity after the 2012 merger of the Screen Actors Guild ("SAG") and the American Federation of Television and Radio Artists ("AFTRA").

5. The AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund (the "Fund") is the name given to the I.R.C. § 501(c)(6) nonprofit organization which oversees a trust fund created to receive and distribute Royalties or other remuneration to artists from SoundExchange and other relevant collecting societies, rights organizations and other appropriate entities in order to comply with the statutory scheme.

6. Pursuant to the statutes, the Fund is obligated to perform its duties without regard to union membership. ...

11. The Fund entered into a Data Purchase and Services Agreement dated July 22, 2013 (the "Services Agreement") with the Unions. Pursuant to the Services Agreement, "the Fund shall pay each Union, within 30 days after the conclusion of each of the Fund's distribution cycles, 3% of the amount distributed by the Fund in such distribution cycle.... Such payment shall constitute complete compensation of the Unions and their personnel for providing the data and services contemplated by this Agreement. There shall be no additional charges or expense reimbursement associated with the Unions' provision of the data and services contemplated by this Agreement."

12. This 3% service fee shall be referred to herein as the "Service Fee." ...

23. Plaintiff and the Class seek equitable, declaratory, and injunctive relief against the Trustees requiring them to: (1) revert back to the Fund the 3% Service Fee for the distribution cycles following July 22, 2013; (2) cease the collection of the 3% Service Fee on all future distribution cycles; and (3) declare the Data Purchase and Services Agreement void and unenforceable."

## **B. Defendants' description of the fee paid to the Unions**

Each of the Defendants provided information regarding the reasonableness of the Service fee in a response to Plaintiff's Interrogatory No. 10, as follows:<sup>1</sup>

"INTERROGATORY NO. 10:

*If YOU contend that the SERVICE FEE is a reasonable charge for the services provided by the UNIONS, state ALL facts that support that contention.*

*RESPONSE TO INTERROGATORY NO. 10:*

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<sup>1</sup> Amended responses, dated March 1, 2021

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*[Objections omitted]*

*Pursuant to the Data Purchase and Services Agreement, the Unions are required to provide the Fund with information in their possession that is necessary to enable the Fund to identify and pay the non-featured performers (both Union members and nonmembers) to whom Royalty payments have been allocated in a given distribution cycle. This valuable data is derived from records developed and maintained by the Unions at considerable expense, including forms obtained by the Unions from producers and/or other individuals or entities involved in the creation of a given sound recording. Specifically, the information provided by the Unions to the Fund is derived from session reports and "B-forms" which contain information necessary to identify and locate some or all of the non-featured musicians and vocalists who performed on a given sound recording. These session reports and B-forms compile information related to both Union members and nonmembers who served as non-featured performers on a given sound recording. These records maintained by the Unions are housed across various local affiliates of each Union, for the most part based on where the relevant sound recording took place. Much of this information exists in records that are maintained locally by the Unions only in hard copy form.*

*Pursuant to the Data Purchase and Services Agreement, the Unions must coordinate with the Fund to provide the information necessary for the Fund to identify and pay non-featured performers. The information provided by the Unions pursuant to the Data Purchase and Services Agreement is essential to the Fund's administration. This information has been collected, compiled, and maintained as part of a large-scale effort by the Unions over the course of decades, and such efforts continue on an ongoing basis. There is no other repository of information documenting the identities, work histories, and payment information associated with non-featured performers that is nearly as exhaustive as the repositories maintained by the Unions. Without this data and the services expended by the Unions to provide this data, the Fund would be significantly constrained in its ability to perform the fundamental task of identifying and locating the non-featured performers for whom Royalty distributions are to be paid, or in the alternative would need to expend substantial efforts and incur substantial costs to compile independently the information provided by the Unions. Accordingly, the data has substantial intrinsic value and is highly valuable to the Fund in the performance of its work.*

*In addition, Union representatives expend considerable effort supplying the valuable data the Unions are obligated to provide under the Data Purchase and Services Agreement. Researchers at the Fund have worked extensively with Union representatives in an effort to build and grow a database compiling the identities of the non-featured performers who performed on a given sound recording, as well as the information necessary to locate and pay such individuals. This database serves as the Fund's central resource used to identify, locate, and pay Royalties to nonfeatured performers. As this database has grown, the Fund has been able more efficiently to identify and locate the non-featured performers who performed on eligible sound recordings. Currently, this database compiles information related to the non-featured performers associated with approximately 136,000 song titles.*

*Because the records maintained by the Unions exist in decentralized repositories dispersed across the Unions' local affiliates, the Unions satisfy their obligations under the Agreement by making numerous representatives available in these locations in order to field requests from the Fund. The Fund's research team—currently staffed with ten full-time research associates and supervisors—works extensively with representatives located in various local affiliates of*

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*the Unions on a year-round basis to obtain information regarding the non-featured performers associated with thousands of song titles. Except with respect to two local affiliates of the AFM (located in New York and Los Angeles) that maintain electronic records on a platform that Fund researchers may directly log into, in all other cases Union representatives handle individual requests from Fund researchers to locate and provide information related to specific song titles and/or to verify the recent contact information for non-featured performers associated with such song title. In locations where such records exist in hard copy form, Union representatives must locate the requested document within their hard copy filing system before scanning and sending a digital copy of the record to the requestor at the Fund. The quantity of the requests made to the Unions by the Fund vary across the respective Unions' locations and fluctuate on a day-to-day and week-to-week basis. It is not uncommon for a Union representative at one location to field dozens of requests from the Fund over the course of a week. Fulfilling each such request may take a Union representative anywhere from a few minutes to thirty minutes or longer.*

*In addition to providing the information necessary to locate and pay nonfeatured performers, the Unions also provide advocacy services both domestically and internationally that benefit non-featured performers (both Union members and nonmembers). These activities include meeting with members of Congress, negotiating with domestic performing rights organizations (PROs), as well as engaging with international PROs to negotiate better terms for the collection and distribution of international royalties. In addition to advocating with the federal government for more expansive rights that would benefit all non-featured performers, the Unions have negotiated and interacted with the World Intellectual Property Organization (WIPO), the Societies' Council for the Collective Management of Performers' Rights (SCAPR), Phonographic Performance Limited (PPL), and the Musicians' Rights Organization Canada (MROC), among other international organizations. This includes efforts to expand the performance right in the United States to apply to non-digital platforms (e.g., terrestrial radio), a cause which the Unions have furthered through their participation in the musicFIRST coalition. The Unions also engage in advocacy efforts with foreign governments for more stringent distribution requirements for collected royalties. These activities all inure to the benefit of non-featured performers, regardless of union affiliation, as they are aimed in part at increasing the scope and overall amount of the royalties paid for recordings on which non-featured musicians and vocalists have performed.*

*In consideration of the inherent value of the data the Unions provide to the Fund, as well as the services provided by the Unions as described above, the Trustees of the Fund agreed in 2013 that each Union should be paid a fee in the amount of 1.5% of the receipts distributed by the Fund in a given distribution cycle. This was an entirely reasonable exercise of the Trustees' broad discretion in determining the value of the information and services provided by the Unions. "*

The depositions of the Fund's and Unions' designee witnesses provided explanations that were consistent with above interrogatory response.

### **C. Amounts received, paid, and payable by the Fund**

The following table shows the total royalties received by the Fund, which is the starting point for the Fund's distribution activities:

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Table 1: Royalties received by the Fund<sup>2</sup>

FY ended 3/31	Royalties received
2013	\$ 27,561,164
2014	41,699,519
2015	49,322,129
2016	46,051,587
2017	52,001,911
2018	65,339,258
2019	61,369,239
2020	71,723,181
<b>Total</b>	<b>\$415,067,988</b>

The following table summarizes the amounts reported in response to Plaintiff's Interrogatory Nos. 6, 7 and 8. This information for years FY2013-FY2019 is also available in the Fund's audited financial statements:

Table 2: Fund's payments to Unions under the 2013 Agreement<sup>3</sup>

FY 3/31	Fees paid to:		Total	Fund's Administrative costs	
	SAG-AFTRA (#7)	AFM (#8)		\$ (#6)	Union Fee %
2013	0	0	0	\$ 2,820,342	0%
2014	\$ 193,814	\$ 193,814	\$ 387,628	3,538,442	11%
2015	272,845	272,845	545,690	6,129,420	9%
2016	420,454	420,454	840,908	6,918,166	13%
2017	872,894	872,894	1,745,788	11,887,748	15%
2018	864,759	864,759	1,729,518	12,936,211	13%
2019	782,462	782,462	1,564,924	11,301,441	14%
2020	825,404	825,404	1,650,808	11,948,304	15%
<b>2013 – 2019 Totals</b>			<b>\$8,465,264</b>	<b>\$67,480,074</b>	<b>12.5%</b>

Largely because information about individual Fund participants and their involvement in sound recordings is incomplete, the Fund has a growing pool of royalties that are awaiting distribution because of an inability to fully ascertain the required information that allows the payment to be made. The following amounts are reported in the Fund's audited financial statements as amounts awaiting distribution:

<sup>2</sup> The Fund's audited financial statements, available on the Fund's website, for amounts through and including 2019. 2020 amount (as well as the earlier amounts that agree with such financial statements) is per Defendant's March 1, 2021 responses to Interrogatory No. 4

<sup>3</sup> Exhibit 2 to the October 20, 2020 deposition of Stefanie Taub (aka DEFS\_00041811), as well as the Defendants' March 1, 2021 amended interrogatory responses

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Table 3: The Fund's royalties paid and payable to participants<sup>4</sup>

Year ended March 31	Distributions payable at year-end	Distributions paid during the year
2013	\$ 13,718,039	\$ 10,188,961
2014	17,624,115	13,010,637
2015	17,797,626	18,288,789
2016	25,074,898	28,248,731
2017	36,586,662	52,001,911
2018	52,654,323	55,847,132
2019	61,785,117	52,345,932
Total		\$229,932,093

In the preceding table, the amounts shown as distributions paid are different than what the Fund reported in response to Plaintiff's Interrogatory No. 5. The response to Plaintiff's Interrogatory No. 5 reports all amounts allocated to participants, including both amounts actually paid to Fund participants and those allocated for payment but not yet paid. Amounts allocated may be awaiting payment because:

1. Complete payee information may not yet have been obtained that would allow a payment to be processed; and/or
2. The Fund holds amounts allocated to participants in accordance with the Fund's stated (publicly reported) policies, so the timing of payment allocations and actual payments are different.

When the Fund lacks sufficient information for make a payment to a participant, the Fund calls such amounts and participants "unclaimed". The following table shows the number of unclaimed participants. In the following table, 2014 was the first year with reliable information, and 2019/2020 amounts are not yet available (because research efforts are continuing).

Table 4: "Unclaimed" participants<sup>5</sup>

Year	"Unclaimed" participants
2011	8,932
2012	8,582
2013	8,268
2014	8,471
2015	10,324
2016	17,297
2017	15,901
2018	15,065

Without the Unions' data, the number of unclaimed participants and the amount of unclaimed royalties would be much higher.

<sup>4</sup> All amounts in the table are from the relevant year's audited financial statements, which the Fund makes available publicly on its website at <https://www.afmsagaftrafund.org/Our-Annual-Report.php>.

<sup>5</sup> For 2014 through 2018, January 20, 2011 deposition of Stefanie Taub, page 211 – 212. All amounts appear on DEFS\_00041813 (notes to Stefanie Taub's January 20, 2021 deposition).

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#### D. The Union's involvement in sound recordings

The Union's data covers a substantial number of performers. The Unions collect and maintain session reports on recordings for which the record label is a signatory to that Union's collective bargaining agreement, including both Union and non-Union performers who performed at such recording sessions. The major record labels are all signatories to the Unions' collective bargaining agreement and report record information regarding both Union and non-Union performers who performed at such recording sessions. The following chart shows the three largest record labels (Sony Music Entertainment, Warner Music Group and Universal Music Group) who together have **around a two-thirds market share**.<sup>6</sup> Because some of the other labels (the remaining approximate one-third market share) also are signatories to the Unions' collective bargaining agreement, it is clear that the Unions' data is more complete than any other source.



<sup>6</sup> <https://www.statista.com/statistics/317632/market-share-record-companies-label-ownership-usa/>

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The Fund's data presented below is generally consistent with the approximate two-thirds amount that can be obtained from simply observing the importance of the three largest music companies. The following tables summarize the count of Fund participants, sorted by Union vs. non-Union membership who have been the subject of royalty distributions in each of the years listed. The non-Union members have a greater percentage of "uncashed" checks. In this context, "uncashed" means that an amount is known to be payable to the participant, but no check is prepared because the Fund lacks a valid address and/or taxpayer identification number.

Table 5: Counts of union vs. non-union participants<sup>7</sup>

Year	Union Member Cashed	Union Member Uncashed	Union Member Total	Non-Member Cashed	Non-Member Uncashed	Non-Member Total
2013	6,673	495	7,168	649	19	668
2014	9,952	9,933	19,885	1,872	32,418	34,290
2015	7,807	2,360	10,167	1,037	4,326	5,363
2016	12,114	4,321	16,435	3,930	7,862	11,792
2017	12,105	4,414	16,519	4,130	6,865	10,995
2018	16,114	6,640	22,754	4,002	10,860	14,862
2019	17,868	9,318	27,186	5,347	14,703	20,050
2020	16,244	10,434	26,678	7,436	13,603	21,039
Totals <sup>8</sup>	98,877	47,915	146,792	28,403	90,656	119,059
% cashed vs. uncashed	67%	33%	100%	24%	76%	100%
% of total			<b>55%</b>			45%

The following table summarizes count information regarding participant royalty allocations that comes from a data base maintained by the Fund. This information shows how frequently the royalty allocations to Fund participants are supported by information found in Union session reports (aka B-forms in AFM's parlance).<sup>9</sup> The data in following table is based on allocations made in distribution cycles for the years listed, based on individual tracks.

<sup>7</sup> DEFS\_00041812 (notes from Stefanie Taub's January 20, 2021 deposition)

<sup>8</sup> The counts shown in the "Totals" row do not refer to the total number of individual participants that have received any royalties during the years listed because the same performer may have been allocated royalties in multiple distribution cycles in the years listed, and would therefore be counted multiple times in the "Totals" row.

<sup>9</sup>The Unions provided digital copies of session reports upon request by the Fund and/or access to computerized data that summarize the physical session reports. In the Fund's efforts (and throughout this report), no distinction is made (because it is immaterial) whether the Unions provide the session report information through a piece of paper, or through access of computerized information.

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Table 6: Participants' royalty allocations supported and not supported by Union data<sup>10</sup>

Distribution year	Royalty allocations (\$)			Count of participant allocations <sup>11</sup>		
	Supported by Union Data	Not Supported by Union Data	Total	Supported by Union Data	Not Supported by Union Data	Total
2015	7,061,560	6,532,870	13,594,431	65,631	54,818	120,449
2016	11,315,957	10,501,107	21,817,063	163,652	34,628	198,280
2017	28,232,735	23,882,669	52,115,404	255,345	62,440	317,785
2018	22,600,518	30,342,433	52,942,951	356,705	99,478	456,183
2019	20,137,367	23,236,395	43,373,762	715,678	101,244	816,922
2020	27,827,087	21,864,239	49,691,326	473,320	168,119	641,439
Total	117,175,224	116,359,713	233,534,937	2,030,331	520,727	2,551,058
%	<b>50%</b>	50%	100%	<b>80%</b>	20%	100%

As shown in the preceding table, approximately 50% of royalty amounts allocated during this period were allocated with the support of data provided by the Unions. Viewing this data from another angle, approximately 80% of all allocations to participants during this period were implemented with the support of Union data.

In the preceding table, the count of participant royalty allocations shown is considerably higher than the percentages of Union members shown in Table 5. This occurs at least in part because the session reports include performers who are not union members but who performed on a recording at a signatory company to the Union agreements. See Section IV.B for additional information.

#### **E. The Fund's analysis of the information provided by the Unions, and the alternative information sources**

The Unions' data includes both who is involved with the performance, and the performers' other identifying information. The Unions provide the following information when available:

1. Who performed on each individual track; and
2. Each performer's personal identifying information, consisting of:
  - a. Name,
  - b. Last known address; and
  - c. Social Security information, which assists in confirming the performer in subsequent communications.

<sup>10</sup> Data base summary from the Funds AS400 system, produced as DEFS\_00042028

<sup>11</sup> The participant allocation columns do not track the count of individual participants to whom royalties were allocated in each year, because a single participant may be allocated royalties on multiple song titles within a given year, and therefore would count multiple times within the participant allocations count listed for that year. Likewise, a participant may be allocated royalties in connection with the same song title in multiple years, and each such allocation would be counted in the "Total" participant allocation rows.

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Absent having all such information, the Fund is unable to make a proper, fully accurate, assumption-free allocation of royalties. When information is incomplete, the result is that some participant(s) are underpaid and other participant(s) are overpaid.

In order to quantify the extent to which this would occur without the Unions' information, in January 2021 in connection with the formulation of this report, the Fund selected 50 titles that had session reports from the Unions. The purpose of the exercise was to ascertain what outcome would result if the Fund did not have the Unions' data available. The Fund's personnel attempted to locate the same information independently (i.e., without using the Unions' information).

The Fund selected 50 titles in a manner that the Fund described as random.<sup>12</sup> All 50 selections had session reports from the Unions. With this sample, the Fund's personnel spent 930 minutes<sup>13</sup> (15.5 hours) time researching the information from non-Union sources.

The results of this test are summarized as follows:

1. Of critical importance, **there was no title in which the additional research using Internet resources provided a more accurate answer.** In all cases, had the Unions' data not been available, the researched answer would have been inferior/wrong. Details in this regard include:
  - a. The Unions' session reports provide information by track, which is the greatest level of detail and supports the most accurate allocation of royalties. Absent having information by track, publicly-available information could be available for the entire album and/or might provide detail that omits certain performers. For the sample that the Fund selected, research details and sources are provided.<sup>14</sup>
  - b. When public data is available, the additional names obtained for an entire album is generally not preferable because this causes a poor assumption that everyone credited to the entire album performed on each track. In this situation, the larger number of participants attributed to each song introduces inaccuracy, leading some artists to receive more than appropriate, with such overpayments reducing payments owed to other participants.
2. **Without the Unions' data, none of the participants had a readily-available address and Social Security information** that would allow the Fund to make a payment to the participant.
3. Using publicly available, non-Union sources of information, the Fund's researchers were able to locate the same credits information (i.e., who performed) for 20<sup>15</sup> out of the fifty tracks in the sample (i.e., 40%).

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<sup>12</sup> The Fund's selection process started with a list of 5,992 titles that (i) had distributions in 2020 and (ii) had Union session reports. Starting approximately halfway through this list, the largest fifty of the next one hundred sequential titles were selected.

<sup>13</sup> DEFS\_00042026, tab "50 Titles-M-V-B Splits -2.19.21", column V

<sup>14</sup> DEFS\_00042026, tab "50 Titles-M-V-B Splits -2.19.21", column W and X provides details of what was locatable with independent research.

<sup>15</sup> Sum of the "Yes" responses in Column E of DEFS\_00042026, tab "50 Titles-M-V-B Splits -2.19.21". Columns F, W and X provides explanatory detail.

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In Section IV.B below, Fulcrum calculates a misallocation rate based on the details of the Fund's sample. The following table summarizes participant attributes of the 50 sample that served as the starting point for Fulcrum's calculation:

Table 7: Summary results from the Fund's comparison of research efforts with the support of Union data vs. Non-Union data only

Attribute	Musicians	Vocalists	Both Musician & Vocalist	Total
Number of non-featured artists using Unions' data <sup>16</sup>	584 <sup>17</sup>	78 <sup>18</sup>	7 <sup>19</sup>	669 <sup>20</sup>
Number of non-featured artists using non-union data and album credits	465 <sup>21</sup>	113 <sup>22</sup>	13 <sup>23</sup>	591 <sup>24</sup>
\$ Amount distributed on the 50 selected recordings from the inception of the Fund to the participants using Unions' data <sup>25</sup>	\$1,678,056 <sup>26</sup>	\$1,942,771 <sup>27</sup>	\$51,511 <sup>28</sup>	\$3,672,338 <sup>29</sup>

#### **F. The Fund's costs of maintaining the participant data base**

As noted above, the Fund's actual costs are less than they would otherwise be because the Fund has the benefit of the Unions' data. The information in this section provides statistics regarding the large number of transactions that the Fund is processing with the benefit of having the Unions' data.

In her deposition on January 20, 2021 as the Fund's designee witness, Stefanie Taub presented her estimates of the amount spent by Fund personnel on research and data base maintenance for the Fund's participants.<sup>30</sup> Ms. Taub estimated that the Fund spends approximately \$3,415,000 annually

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<sup>16</sup> This information (DEFS\_00042026, tab "50 Titles-M-V-B Splits -2.19.21", columns G through O) is maintained in the Fund's ASA 400 computer system. [https://www.youtube.com/watch?v=ASO\\_zypdnsQ](https://www.youtube.com/watch?v=ASO_zypdnsQ)

<sup>17</sup> Digitally referenced as the sum of column D in Exhibit 2

<sup>18</sup> Digitally referenced as the sum of column F in Exhibit 2

<sup>19</sup> Digitally referenced as the sum of column H in Exhibit 2

<sup>20</sup> Digitally referenced as cell Z in Exhibit 2

<sup>21</sup> Digitally referenced as the sum of column J in Exhibit 2

<sup>22</sup> Digitally referenced as the sum of column L in Exhibit 2

<sup>23</sup> Digitally referenced as the sum of column N in Exhibit 2

<sup>24</sup> Digitally referenced as cell AA in Exhibit 2

<sup>25</sup> This information (DEFS\_00042026, tab "50 Titles-M-V-B Splits -2.19.21", columns G through O) is maintained in the Fund's ASA 400 computer system.

<sup>26</sup> Digitally referenced as the sum of column A in Exhibit 2

<sup>27</sup> Digitally referenced as the sum of column B in Exhibit 2

<sup>28</sup> Digitally referenced as the sum of column C in Exhibit 2

<sup>29</sup> Digitally referenced as cell Y in Exhibit 2

<sup>30</sup> January 20, 2011 deposition of Stefanie Taub - (30(b)(6) topic 15) - pages 199 - 204

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on this function.<sup>31</sup> This cost number does not include the required indirect costs for this function, so management and other administration costs are not part of this total that Ms. Taub presented.

Comparing this \$3,415,000 of direct costs to what is paid to the Unions under the 2013 Agreement, the Fund's direct internal costs are roughly twice what the Unions are paid. Yet, as noted in the prior Section III.E, the Unions are the first, and the most reliably accurate source used for track title credit and participant data.<sup>32</sup>

The following table shows the number of new titles created and researched by year:

Table 8: New titles created in the Fund's database<sup>33</sup>

Year	Count of Titles
2013	3,255
2014	2,149
2015	4,867
2016	7,243
2017	8,971
2018	7,730
2019	8,656
2020, as of 11/10/2020	8,034
Total	50,905

#### IV. SUMMARY OF CONCLUSIONS

The combined 3% fee paid to the Unions for the use of the Unions' information and related assistance is reasonable. Absent access to this information, the Fund would not be able to make payments that are as accurate as is now occurring and would not be able to make accurate payments to as many participants as are now receiving royalties from the Fund. In support of this:

1. There are numerous businesses that charge significant sums for the use of information, which provides a precedent for the amounts being paid to the Unions. See Section A below.
2. If the 2013 Agreement (and related payments to the Unions) did not exist, the Fund would not be able to make payments to participants that are as accurate and complete as what is now occurring. Except for the participants contacting the Fund to provide address and tax reporting information, the Fund has no alternative source for address and tax reporting information. See Section B below.
3. Multiple economic factors relating to the attributes and use of the Unions' data support the reasonableness of the 3% fee. See Section C below.

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<sup>31</sup> January 20, 2011 deposition of Stefanie Taub - (30(b)(6) topic 15) – page 204; DEFS\_00041814

<sup>32</sup> Participants can call the Fund to provide information. The Fund's current practice is to have the performer complete and return a "Performer Information Form" (aka PIF) to verify that person's information prior to sending payment. Nevertheless, the Social Security information and address obtained from the Unions provides the Fund initial contact information for the performer and an identifier (Social Security information) to help identify the individual.

<sup>33</sup> DEFS\_00042020

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4. Plaintiff's assertions regarding (i) the incremental cost of providing the Union's information, and (ii) how the timing of payments should be evaluated are based on descriptions of the payments that are inconsistent with the 2013 Agreement, and the nature of royalties generally. See Section D below.

**A. Numerous businesses are based on the accepted axiom that information is valuable and can be sold in market-based transactions.**

Plaintiff's complaint is based on the incorrect premise that the Unions must give away (for free) information that the Unions have accumulated over decades. Because of this, Plaintiff contends that the Unions might be reimbursed for only the incremental costs of work initiated in response to the Fund's needs. Under this incorrect notion, the Unions should not be compensated for either their past efforts, or for a proportionate current cost of the Unions' operations that are required for the incremental efforts to be incurred.

Numerous compensation arrangements are based on a percentage of an underlying transaction value. For example, (i) commission sales arrangements, (ii) the majority of royalties, (iii) investment fees for money managers, and (iv) numerous representation agreements (e.g., contingency lawyers and talent agents) are all based on a percentage of the related transactions. In none of these arrangements is the cost (and particularly the incremental cost) of providing the service typically part of the compensation formula.

Numerous businesses exist because the economics of information is different than what Plaintiff imagines. Information has value, and those with valuable information are able to charge for its use. The incremental cost of providing access to information is never a valid or intelligent basis for determining a price. A sample of businesses that are based on selling information include:<sup>34</sup>

1. The mailing list industry has been around for decades, initially using physical addresses, and more recently using email addresses. The mailing list industry obtains revenues for the use of information (specifically contact information) which has already been compiled. The incremental cost of distributing the list to each buyer has never been the basis for valuing the lists.
2. In terms of its revenues, Google and Facebook are information and marketing companies whose profits are largely attributed to the sale and use of their users' information. Anyone using Google or Facebook realizes that advertisements appear based on a user's past browsing/input history. Google and Facebook obtain a premium for advertising because they capture this information and match advertisers with potential customers. Despite the fact that many of its services are free, Google (NASD: GOOGL) and Facebook (NASD: FB) are highly profitable and valuable, with market capitalizations of \$1.4 trillion, and \$760 billion, respectively. Obviously, Google and Facebook do not sell their information for the almost non-existent incremental cost of running software and algorithms.
3. Fair Isaac Corporation (aka, FICO - NYSE: FICO) sells the use of its industry-standard credit scoring algorithm. At the time of this writing FICO has a market capitalization of approximately \$14 billion. FICO describes its business and revenues and customers as follows:

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<sup>34</sup> The market capitalization values presented in this section are as of February 6, 2021.

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*"Our FICO® Scores are used in the majority of U.S. credit decisions, by nearly all of the major banks, credit card organizations, mortgage lenders and auto loan originators. These credit scores, developed based on third-party data, provide a consistent and objective measure of an individual's credit risk. Credit grantors use our FICO® Scores in a variety of ways: to prescreen candidates for marketing programs; to evaluate applicants for new credit; and to manage existing customer accounts. FICO® Score is a three-digit score ranging from 300-850. They are calculated by running data from the three U.S. national credit reporting agencies, Experian, TransUnion and Equifax, through one of several proprietary scoring models developed by FICO. Lenders generally pay the credit reporting agencies scoring fees based on usage, and the credit reporting agencies pay an associated fee to us. ...<sup>35</sup>*

*Our products and services serve clients in multiple industries, including primarily banking, insurance, retail, healthcare and public agencies. End users of our products include 96 of the 100 largest financial institutions in the U.S., and two-thirds of the largest 100 banks in the world. Our clients also include more than 600 insurers, including nine of the top ten U.S. property and casualty insurers; more than 300 retailers and general merchandisers; more than 200 government or public agencies; and more than 200 healthcare and pharmaceuticals companies, including nine of the world's top ten pharmaceuticals companies. Eight of the top ten companies on the 2020 Fortune 500 list use one or more of our solutions. In addition, our consumer services are marketed to an estimated 200 million U.S. consumers whose credit relationships are reported to the three major U.S. credit reporting agencies."<sup>36</sup>*

Generally, FICO does not store or have the underlying data that its algorithms use. FICO incurs no incremental cost or effort each time its credit scoring algorithm is used, but FICO's customers willingly pay significantly for the information and insight that FICO provides. In the fiscal year ending September 30 2020, FICO had \$1.3 billion of revenues.

4. Nielsen Holdings (NYSE: NLSN) sells information that it collects regarding consumer behavior. At the time of this writing NLSN has a market capitalization of approximately \$8.1 billion. The price Neilson's customers pay for its ratings has little to do with the cost of running a report, but is instead based on the value of the information. Neilson describes itself as follows:

*"We are a leading global measurement and data analytics company. We provide clients with a comprehensive understanding of what consumers watch and what they buy and how those choices intersect. We deliver critical media and marketing information, analytics and manufacturer and retailer expertise about what and where consumers buy and what consumers read, watch and listen to (consumer interaction across the television, radio, print, online, digital, mobile viewing and listening platforms) on a local and global basis. Our measurement and analytical services help our clients maintain and strengthen their market positions and identify opportunities for profitable growth. ..."<sup>37</sup>*

5. TransUnion (NYSE: TRU) and Equifax (NYSE: EFX) have market capitalizations as of this writing of \$17.7 billion and \$22.0 billion, respectively (Experian is privately held, so does not

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<sup>35</sup> FICO Form 10K as of September 30, 2020, page 7

<sup>36</sup> FICO Form 10K as of September 30, 2020, page 10

<sup>37</sup> NLSN Form 10K as of December 31, 2019, page 3

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have a publicly-traded value). All of these personal credit rating agencies sell information that they have accumulated over time. Even though the three companies provide services that are highly competitive, the information these companies have is extremely valuable. The incremental cost of these companies running a computer report on already-existing data is virtually nil, but no competent business person or appraiser would thereby suggest that this means the information provided by these companies is worthless.

6. RELX PLC (fka Reed Elsevier) has a market capitalization as of this writing of \$47.0 billion, with 2019 revenue of approximately \$9.7 billion. RELX provides information, analytics and decision tools for professional and business customers. Its operations/units include (i) Scientific, Technical & Medical, (ii) Risk & Business Analytics, and (iii) Legal. The Legal unit consists primarily of market-leader LexisNexis, which is a staple of legal research in the United States.
7. In the United States, there are four real estate title companies serving the entire country (plus additional local competitors). These four companies are described below. In this entire industry, the companies use data bases in which they have made substantial past investments (called title plants). The revenues charged by these companies have almost nothing to do with running another computer report using this title plant, and no one knowledgeable in this industry would suggest otherwise. Information regarding the four largest companies in this industry in the U.S. follow:
  - a. Fidelity National Financial (NYSE: FNF) has an \$11.5 billion market capitalization. FNF's description of its business includes:

*"Most real estate transactions consummated in the U.S. require the use of title insurance by a lending institution before the transaction can be completed. Generally, revenues from title insurance policies are directly correlated with the value of the property underlying the title policy.<sup>38</sup> ...*

*A title insurance company's predominant expense relates to such searches and examinations, the preparation of preliminary title reports, policies or commitments, the maintenance of "title plants," which are indexed compilations of public records, maps and other relevant historical documents, and the facilitation and closing of real estate transactions. Claim losses generally result from errors made in the title search and examination process..."<sup>39</sup>*
  - b. First American Financial (NYSE: FAF) has a \$6.1 billion market capitalization. FAF describes its business and underlying data bases as follows:

*"The Company, through its subsidiaries, is engaged in the business of providing financial services through its title insurance and services segment and its specialty insurance segment. The title insurance and services segment provides title insurance, closing and/or escrow services and similar or related services domestically and internationally in connection with residential and commercial real estate transactions. It also provides products, services and solutions that are designed to mitigate risk in, or otherwise facilitate real estate transactions. Many of*

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<sup>38</sup> FNF Form 10K as of December 31, 2019, page 4

<sup>39</sup> FNF Form 10K as of December 31, 2019, page 5

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*these products, services and solutions involve the use of real property-related data, including data derived from its proprietary databases. It maintains, manages and provides access to title plant data and records ...*<sup>40</sup>

*Title insurance policies insure the interests of owners or lenders against defects in the title to real property. These defects include adverse ownership claims, liens, encumbrances or other matters affecting title. Title insurance policies generally are issued on the basis of a preliminary title report or commitment, which is typically prepared after a search of one or more of public records, maps, documents and prior title policies to ascertain the existence of easements, restrictions, rights of way, conditions, encumbrances or other matters affecting the title to, or use of, real property. ... To facilitate the preparation of preliminary title reports and commitments, copies and/or abstracts of public records, maps, documents and prior title policies may be compiled and indexed to specific properties in an area. This compilation is known as a "title plant."*<sup>41</sup>

- c. Stewart Information Services (NYSE: STC) has a \$1.3 billion market capitalization. Stewart's description of itself and its competitors<sup>42</sup> is generally consistent with the first two title companies described above, and is not provided here in the interest of brevity.
- d. Old Republic International (NYSE: ORI) has a \$5.8 billion market capitalization. ORI is a more diversified insurance company with a separate division offering title products. Currently, ORI's title business comprises a bit more than a third of ORI. Again, ORI's description of itself and its competitors<sup>43</sup> is generally consistent with the first two title companies described above, and is not provided here in the interest of brevity.

**B. If the Fund did not have access to the information made available by the 2013 Agreement, the Fund would not be able to make accurate payments to the participants, both Union members and non-Union members.**

As summarized in Section III.E above, the Fund has no good (complete) alternative to the data provided by the Unions. To the extent the Fund now has its own database with participant information, the information exists in large part from data provided by the Unions. For over half of the titles in the 50 title sample prepared by the Fund, material misallocations of royalties occurred when the Unions' data was not available. The misallocations include having too few participants identified, to have too many participants credited because of assumptions made for all tracks based on album-wide information. Examples of each follow:

1. For an example of fewer participants being paid than actually performed on the relevant song title, consider the example of the song "My Heart Will Go On" by Celine Dion. Without Union session report information, the Fund's researchers were able to identify a total of seven performers credited on this title, whereas the session report revealed a total of 65 performers. In this instance, the total royalties distributed on this title would have been incorrectly divided among seven performers, resulting in improperly large payments to each

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<sup>40</sup> FAF Form 10K as of December 31, 2019, page 5

<sup>41</sup> FAF Form 10K as of December 31, 2019, page 6

<sup>42</sup> STC Form 10K as of December 31, 2019

<sup>43</sup> ORI Form 10K as of December 31, 2019

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of these seven performers, and the omission of payments to 58 otherwise unidentified performers. If the Fund had incorrectly distributed these larger royalty payments to just seven performers, this would have resulted in a total of \$27,116.24 in misallocated royalties, which represents 45% of the total royalties allocated on this title.

2. For an example of too many participants being paid than actually performed on the relevant song title, consider the example of the song "Get Me Some of That" by Rhett Thomas. Without Union session report information, the Fund's researchers would need to rely on album-wide credits to identify the performers on this song title, which would result in a total of 46 performers being credited as having performed on this song title. However, the session report for this song title shows that in fact only 12 of these performers were on this track. This means that, absent Union session report information, a total of 34 performers would have been incorrectly paid for a track on which they did not perform, whereas the 12 performers that were actually on the track would receive significantly smaller royalty payments than they should have properly been allocated had the Fund had the benefit of Union session report information. In this instance, the lack of session report information would have resulted in a total of \$108,053.81 in misallocated royalties, which represents 83% of the total royalties allocated on this title during the relevant time period.

The following table summarizes the misallocations from not having the Unions' information:

Table 9: Allocation error rate in the Fund's sample of 50 titles

	Participant count	Participant distributions
Total existing allocations using Union data (from Table 7)	669 <sup>44</sup>	\$ 3,672,338 <sup>45</sup>
Allocation errors from not using the Unions' data	404 <sup>46</sup>	\$ 1,099,100 <sup>47</sup>
% error	60% <sup>48</sup>	30% <sup>49</sup>

As shown in Section III.D, data provided by the Unions cover from around 50 to 80 percent<sup>50</sup> of the Fund's activities (see bolded percentages), depending upon how one wishes to make such measurement, or whether one wants to rely on the Fund's database at all on this specific point. Applying this range of percentages to the error rate shown in Table 9, the Union's data improves the overall accuracy of the Fund's work in the range of approximately 15% to 50%. All such amounts are obviously higher than the 3% paid to the Unions.

If one wants to instead look at the misallocations in terms of dollars, the percentages in the preceding paragraph (i.e., 15% to 50%) can be applied to the distributions made, which are reported in Table 3 above. 15% to 50% of roughly \$230 million (through the end of 2019) equals from \$34.5 million to \$115 million. These amounts will continue to increase as the Fund makes distributions after 2019.

<sup>44</sup> Digitally referenced as cell Z in Exhibit 2

<sup>45</sup> Digitally referenced as the sum of column and cell Y in Exhibit 2

<sup>46</sup> Digitally referenced as the sum of column W in Exhibit 2

<sup>47</sup> Digitally referenced as the sum of column X in Exhibit 2

<sup>48</sup> Digitally referenced as cell AB in Exhibit 2

<sup>49</sup> Digitally referenced as cell AC in Exhibit 2

<sup>50</sup> See Table 6

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The information held by the Unions is valuable because the session reports have the following attributes:

1. Accuracy & Reliability – Information that is not accurate is obviously worth less. Historical information is generally more reliable if it was recorded contemporaneously. In this situation, the session reports are original business records that were contemporaneously recorded, and are required to support payroll. As a class of accounting record, payroll records tend to be accurate because, in addition to whatever controls exist by the payor of the payroll, the payroll recipient is motivated to be paid correctly.<sup>51</sup>
2. Availability - Information loses value as the information becomes more widespread or commonly known. Stated otherwise, as more people have the information, the information loses its value. For example, information that is obtained easily on the internet is not as valuable as information known to only a small group. In this situation, the Union-maintained information is generally not otherwise available.
3. Relevant - Anything that is not relevant will hold small or immaterial value to the target audience. This means that information is more valuable to different group(s) based on each group's activities and interests. This is important in understanding past transactions, or the lack thereof. Information will have value to a group to whom it is relevant (such as the Fund), even though the information has not previously been sold.
4. Completeness – For large data collections, a complete collection will be more valuable than incomplete sets. If the same type of data can be obtained from multiple sources, the more complete data collection will be more valuable. In this situation, the Unions' information is more complete than any alternatives, and covers the vast majority of distributions that the Fund is required to make.
5. Ease of use – Data that the buyer finds easy to use will be more valuable; stated otherwise, the cost of using the data is an offset to the value that the data would otherwise have. Applied to this situation, data that (ii) is contained in an electronic data base or (ii) is based on a standard form containing the needed data (as the majority of the Unions' data is), is faster and easier to use.

For these reasons, the Unions are asked for session reports for nearly every title.<sup>52</sup> The Unions are able to respond a high percentage of the time in certain locations, and in certain music genres. This was explained by Julie Sandell as follows:<sup>53</sup>

*Q. So just going back to my question, though, whatever the number is of new research that the Fund is doing, that doesn't mean that the unions are providing information for that same number of titles, right?*

*A. Right. It depends on the genre. I would say in Nashville, probably 95 percent. Broadway, big band, movie soundtracks, underscore, huge. It's critical.*

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<sup>51</sup> This comment does not require that the session reports to be infallible. Mistakes occur in all types of business records. This factor addresses the accuracy of the subject information when compared to the alternatives.

<sup>52</sup> December 9, 2020 deposition of Julie Sandell , pages 47 - 48

<sup>53</sup> December 9, 2020 deposition of Julie Sandell , pages 67 - 68

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*Q. And in your opinion is Nashville 95 percent because they've undertaken the effort to digitize their records?*

*A. No, because the music that's produced there is produced by the session musicians and background vocalists that are union members.*

*Q. Why is that specific to Nashville? Maybe I'm just not understanding.*

*A. It's just the way their music production historically has been. The way their music has been created there. And LA too."*

See Section III.E above. When the Unions do not have session reports, the Fund is left to obtain the necessary information itself. For recently-produced digital music, there are fewer artists to discover. Additionally, the names of participants for newer music could be available on Pandora<sup>54</sup> or Discogs<sup>55</sup> (but not such participants' addresses and tax identification numbers).<sup>56</sup>

When the music is not recently produced and/or is not easily researched using public sources, the Unions' session reports are a critical means of obtaining information on artists to whom royalties have been allocated by the Fund. The Session reports also provide contact information and taxpayer identification information. All of this data is required before an artist can be paid. As an example, Ms. Gorbacsov testified:<sup>57</sup>

*"Q. Does anyone besides SAG-AFTRA have access to these session reports?*

*A. No.*

*Q. It's not possible for the Fund to contact any particular individual or entity other than SAG-AFTRA to maintain these reports?*

*A. No, there's no one else who would be able to provide these reports and we don't provide these reports to anyone else."*

If the Unions did not provide session reports, the Fund would not be able to identify performers in many circumstances, or would mis-identify performers, always to some musicians' detriment. Julie Sandell summarized the efforts and challenges involved when the Unions do not provide session reports, and the Fund is forced to address its requirements on its own, as follows:

*"Q. Okay. If the union wasn't able to provide a session report for a given album or track back in 2009, what would you do next?*

*A. You have to make a choice of using the credits that you found on the Internet. Sometimes I would get books from the library, or my own library, my own albums trying to track down the liner notes from the album. But that still didn't help because there's a lot of cases where the session musicians were not listed on the liner notes. So we had another option where we*

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<sup>54</sup> <https://www.pandora.com/> - Pandora is an American subscription-based music streaming service owned by Sirius XM Holdings.

<sup>55</sup> <https://www.discogs.com/> - Discogs is a crowdsourced database about audio recordings, including off-label releases.

<sup>56</sup> December 9, 2020 deposition of Julie Sandell , pages 126 - 127

<sup>57</sup> December 9, 2020 deposition of Julie Sandell , pages 39, 41-42ctober 23, 2020 deposition of Kristina Gorbacsov , page 128

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*could put no credits found and hope that musicians would make a claim and provide the session reports; maybe they kept a copy.*

*... The problem with that is, just like in the old days, they're more concerned with the featured artist, the songwriters, the producers, the engineers, all the Grammy-nominated credits. The session musicians tend to be an afterthought. And that is the beauty of the old union-style session reports is that it was a document, a historical document that could be used. And now if a song is created and nobody is in charge of compiling the credits, then they can get lost. Someone might not have been at the first session where the guitar player played, and then when they remix it, they overdub somebody else, and then it goes to the record label and nobody knows that they were there. " <sup>58</sup>*

and

*"[T]he titles would be incomplete and a lot of musicians would not receive their royalties...*

*Artists that have good liner notes and track breakdowns might be able to -- we might be able to find. But what happens if we don't find a track breakdown. So we can use album credits, right? So I wonder if you have an album and one song has an orchestra or a choir or a big horn section, but if we can't find a track breakdown, we're going to add all of those musicians to every track. So let's say there's one track where it's just a guitar player and a keyboard player, their shares will now be diluted by all those extra players. And they're not -- they're not winning.*

*Or we put nobody in, and because we can't decide and we don't want to pay a whole choir for a track, so now we put nobody in and so those guitar players are now getting zero. So they're either getting their shares diluted or they're getting zero. " <sup>59</sup>*

### **C. The attributes and use of the Unions' data cause the 3% fee to be reasonable.**

The landmark case, Georgia-Pacific Corp. v. United States Plywood Corp., 318 F. Supp 1116, 6 USPQ 235 (SD NY 1970) provides a 15-factor test that lists relevant economic factors when determining a reasonable royalty. Although the Georgia-Pacific case is more commonly applied to patents (as this was the case's initial application), the Georgia-Pacific rationale is used by analysts to address reasonable royalties with other forms of intellectual property. Although not required in the instant litigation, the decision does provide a useful list of helpful considerations when determining a reasonable royalty rate. Therefore, I consider the fifteen Georgia Pacific factors below, after modifying them for the non-patent situation at issue here. The fifteen (paraphrased) factors, and their application to this matter, are as follows:

- 1. The royalties received by the licensor for licensing the [intellectual property], proving or tending to prove an established royalty.**

Georgia-Pacific factor #1 involves consideration of the existence of an established royalty for the intellectual property at issue. Other than under the 2013 Agreement, the Unions have not sold or

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<sup>58</sup> December 9, 2020 deposition of Julie Sandell , pages 39, 41 - 42

<sup>59</sup> December 9, 2020 deposition of Julie Sandell , pages 125 and 127

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licensed the information being provided to the Fund.<sup>60</sup> The Fund has not been able to identify any alternative sources of information for the number of tracks that the Union data covers.

Although not pertaining to the Union's past activities, Section A above provides substantial authority for the premise that information is quite valuable in market transactions.

*2. The rates paid by the licensee for the use of other similar [intellectual property].*

The Fund has no similar licenses or agreements. There is no alternative source of the Unions' information.

*3. The nature and scope of the license, such as whether it is exclusive or nonexclusive, restricted or non-restricted in terms of territory or customers.*

An exclusive license is more valuable (expensive) than a non-exclusive license. Although the Unions are not prohibited from licensing the same information to others, there are no other licensees that currently have access to the Unions' information (other than the Unions' affiliated organizations, such as health and pension plans, that are provided information under the Unions' respective collective bargaining agreements).

*4. The licensor's policy of maintaining its [intellectual property] monopoly by licensing the use of the [intellectual property] only under special conditions designed to preserve the monopoly.*

The Unions have not sold or used the information at issue with others (except as already noted for affiliate transactions for benefits), and I understand they would not do so outside of the 2013 Agreement.

*5. The commercial relationship between the licensor and licensees, such as whether they are competitors in the same territory in the same line of business or whether they are inventor and promoter.*

The Unions and the Fund are not competitors and have complementary purposes. This is the only reason that the 2013 Agreement exists. Absent this factor (i.e., if the information was being shared with an entity that was competitive to, or otherwise a threat to, the Unions), the royalty rate would need to be considerably higher than the 2013 Agreement's price.

*6. The effect of selling the [intellectual property] in promoting sales of other licensor's products; the existing value of the invention to the licensor as a generator of sales of other items; and the extent of such derivative or "convoyed" sales.*

This factor involves so-called "convoyed" sales. Examples of convoyed sales are repair or extended warranty contracts, or supplies/consumables that are uniquely fitted to the product at issue. There are no such additional sales or transactions with the Unions' information.

*7. The duration of the [intellectual property] and the term of the license.*

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<sup>60</sup> The Unions share some membership data with related pension and health funds pursuant to collective bargaining agreements.

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Unlike a patent which is published publicly and provides exclusivity for a discrete time period, the information provided under the 2013 Agreement can remain confidential without expiration. This makes the information more valuable when compared to protections with a known expiration.

8. *The established profitability of the [intellectual property], its commercial success and its current popularity.*

The information provided by the Unions is used to make payments on royalties that have already been received. The Fund has an obligation to distribute the payments to the artists, which the Fund could not do without either having the Unions' information or somehow recreating such information itself. There is no question that the information is needed, because the Fund has already received the royalties, and is assured of receiving future royalties. The lack of risk-taking makes the Unions' information more valuable than would otherwise be the case.

Deposition testimony in this matter indicates that the Fund trustees and executive director gave consideration in 2013 to comparable fees that were being charged by others. For example, Duncan Crabtree Ireland testified:<sup>61</sup>

*"[A]s far as I know, pretty much all of those organizations charge a similar or a higher administrative fee than the Fund does. With the possible exception of PPL, their fee might be a little lower because of the volume of payments that they handle. But that was the kind of thing that we were looking at in terms of what's -- you know, what's a reasonable administrative fee to charge in an environment where there's not a subsidy going on by a union, which is -- you know, in none of those -- in none of those organizations would there be a union subsidizing the operations of those CMOs. And so that was a data point, I think, to help us evaluate the overall reasonableness of the cost structure. ...*

*an appropriate data point or metric to consider is because those institutions, ultimately, have to do the same function. So whether they can acquire the data from someone else who already has it or whether they have to generate that data themselves, either way it's an indication of what the cost and value of that data might be and something to take into account."*

Consistent with this, Dennis Dreith testified:

*"The norm of the foreign societies have requirements in their EU law how much we can charge in administrative expenses, and our bilateral agreements had to be matched to theirs for collection of foreign royalties so. I did point out that to have a higher administrative fee would put us above the allowable amount. ...<sup>62</sup>*

*[S]omebody asked me on the board, possibly Duncan, I think, asked me well, what would be a percentage that would keep us at or below the threshold to not trigger a problem with the foreign CMOs. And I had said at that point, I believe 3 percent would keep us at the threshold at or below that point<sup>63</sup>.*

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<sup>61</sup> February 16, 2021 deposition of Duncan Crabtree-Ireland, pages 243 - 244

<sup>62</sup> February 11, 2021 deposition of Dennis Dreith, page 164

<sup>63</sup> February 11, 2021 deposition of Dennis Dreith, page 166

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9. The utility and advantages of the [intellectual property] over any old modes or devices that had been used.

10. The nature of the [intellectual property], its character in the commercial embodiment owned and produced by the licensor, and the benefits to those who used it.

Factors 9 and 10 are often considered together, as I do here.

See Sections III and IV.B above. The Unions' information is critical to the Fund in complying with the Fund's obligations. Other than attempting to research the data independently, there is no alternative to having the Unions' data. However, the Fund is unable to independently research the full scope of recordings that the Unions' data covers, and such independent efforts provide results that are less accurate than occurs when using the Unions data.

The following considerations described in Section III.D are important in addressing the benefit that non-union participants receive from having use of the Unions' information:

- a. The session reports include information on performers who are not union members who play at recording sessions that are covered by Union collective bargaining agreements.
- b. The Unions' information covers between 50% to 80%<sup>64</sup> of the Fund's royalty allocations, depending how one wishes to measure this. For this large portion of the research that needs to be done, the Fund's costs are less because the Unions provide their information. The non-Union participants benefit from having this less-expensive information available because the overall costs of the Fund are deducted from all distributions. Stated otherwise, by having information regarding Union recording sessions and the Union members, additional resources are available to research tracks that did not result from a Union recording session. When the overall cost to the Fund is lessened, all participants benefit, both Union and non-Union.

The Unions provide other services described in the 2013 Agreement that are in addition to providing the information needed to make distributions to artists.

11. The extent to which the [licensee] used the invention and any evidence probative of the value of that use.

See Sections III.E and IV.B above for information regarding the payments made to participants, and how the data provided by the Unions makes such payment more accurate. The Fund uses the Unions' information as a critical and integral part of the Fund's mission. The Fund has no alternative to the use of the Unions' information without materially sacrificing the accuracy of the payments that are made to the participants. The Unions' data is critical to the Fund's ability to comply with its mission and purpose.

As shown in Table 9 and the related commentary thereto, the Unions' data provides a substantial increase in the accuracy of the payments being made. When expressed as a percentage of the Fund's overall distributions, the 3% fee paid to the Unions is small relative to the much larger increase in accuracy.

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<sup>64</sup> See Table 6

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There are a large number of artists receiving payments from the Fund, with some of the individual payments being modest. The large number of participants increases the Fund's challenge in paying only a cost for each artist that is proportionate to what is owed. The 3% fee to the Unions for their information used in Fund distributions accomplishes this objective.

12. *The portion of the profit or selling price that is customary in the particular business or in comparable businesses.*

I am not aware of any industry standard rates that are applicable in this situation.

13. *The portion of the realizable profit that should be credited to the [intellectual property] as distinguished from any other elements, manufacturing process, business risks or significant features or improvements added by the [licensee].*

The payment of a 3% fee allows the payments to be considerably more complete and accurate than would occur otherwise. Under the 2013 Agreement, the amounts paid to the Unions are a modest portion of the Fund's administrative costs.<sup>65</sup> As shown in Table 1, the fees paid to the Unions<sup>66</sup> range from 9% to 15% of the Fund's total General and Administrative costs (with an overall average of 12%). Because the information provided by the Unions is central to the Fund's ability to meet its mission and purpose, and there are no alternatives to find the needed information (particularly for older performances), the 3% fee being paid to the Unions is sensible economically.

14. *The opinion testimony of qualified experts.*

I do not have the reports from other experts in this matter, or in other matters involving the parties in this case.

15. *The amount that the licensor and a licensee would have agreed upon at the time the [use] began if they had reasonably and voluntarily tried to reach an agreement.*

This Georgia Pacific Factor is a reconciliation and conclusion of the preceding factors to arrive at a reasonable royalty conclusion. The following facts and circumstances bear most heavily on the correct reasonable royalty rate:

1. The information is critical to the Fund's mission and purpose. The Fund has no economically viable alternative in terms of obtaining the information from a source other than the Unions that would allow the same level of completeness and accuracy that is achieved using the Unions' data.
2. The 3% fee paid to the Unions is small relative to the much larger increase in accuracy occurring by using the Unions' information.

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<sup>65</sup> See the supplemental Schedule of Expenses that is part of most of the Fund's audited financial statements available on the Fund's website. Contrary to the Plaintiff's contentions, the description and amount paid to the Unions consistently appears in these publicly-available audited financial statements.

<sup>66</sup> See the Unions' answers to Interrogatory Nosx 7 and 8 (March 1, 2021).

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3. The Fund incurs no risk of losing money, as the percentage amounts paid to the Unions are calculated only based on successful distributions of amounts already received. This "no-risk" situation is unusual in business activities.
4. Some of the potential payment recipients are owed individually modest amounts. This underscores the requirement that the needed information be obtained inexpensively relative to the individual amounts being distributed. A 3% fee accomplishes this objective.
5. The Unions provide other services to the Fund in addition to the information needed to make distributions to non-featured artists.

**D. Amounts paid to the Unions for their information need not occur (and should not be expected to occur) based on when the underlying information was obtained, or the underlying work occurred.**

Plaintiff incorrectly contends that the percentage-based payments made by the Fund to the Unions need to correspond to work performed by the Unions in the same time period as the payment. For example, Plaintiff's response to Interrogatory No. 11 (February 12, 2021) includes:

*"... The membership data is simply copied to the Fund, without regard to whether the Fund actually needs the information. The data is also duplicated from prior years, leaving the Fund to sort through the data dump to pick out the information that it requires for the distribution before verifying it for accuracy. The Fund has been accumulating its own, up to date, verified data since its creation. The data for prior years' tracks and identified performers have already been accumulated. The delta between the information already known by the Fund and new information sought is small, if not non-existent. Unlike music production of days past, the likelihood of a Union session is rare. If the track was not a Union session, the Unions would have no chance of obtaining any relevant information that would assist the Fund."*

The preceding quote contains multiple errors and omissions that explain why Plaintiff's contentions are incorrect. For example:

1. In contrast to the Plaintiff's contention, payments for the use of information or other intellectual property are almost never received in the same period in which the underlying work was performed. Plaintiff's proposed timing requirement almost never occurs with such payments, and need not be a requirement for the 2013 Agreement to be economically reasonable.
2. As previously discussed, Plaintiff is incorrect that the Unions have no information regarding non-Union performers, because all labels that are signatories to the Union agreements are required to include all performers in their session reports, including non-Union performers.
3. As previously discussed, the Unions have current members who perform new music, for which the Fund receives and will continue to receive royalties that need to be distributed.
4. Information that the Fund continues to use has ongoing value. Plaintiff admits that the Fund has possession of Union historical information, which the Fund continues to need and use. Plaintiff's position quoted above is based on the position that the Fund should be entitled in perpetuity to make ongoing use of the Unions' data without paying any compensation.

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While the parties have sometimes described the fee paid to the Unions as a "Service Fee", this name is a misnomer when applied to the "data" and "information" that repeatedly is identified as being a central aspect of the 2013 Agreement. The 2013 Agreement's description of the arrangement includes:

*"WHEREAS, the Agreement and Declaration of Trust authorizes the Trustees of the Fund to purchase relevant data from the Unions (and others) and to employ assistants; and*

*WHEREAS, the Trustees of the Fund have determined that it is reasonable and appropriate at this time to memorialize arrangements for the provision by the Unions to the Fund of certain data and assistance in exchange for reasonable compensation to the Unions from the Fund;*

*NOW, THEREFORE, the Parties, intending to be legally bound, hereby agree as follows:*

*3. Provision of Data. From and after the Effective Date, each Union shall provide the Fund the following data, in a manner comparable to the way such data has been provided immediately prior to the Effective Date:*

- Access to member databases to enable the Fund to obtain identifying and contact information for members.*
- Access to session reports and "B-forms," or databases containing information derived therefrom, that in either case, identify the recordings made at recording sessions and provide identifying and contact information for performers (Union members and nonmembers) who performed at the session.*

*Each Union retains all its ownership rights in its data, and all such data shall be considered Confidential Information of the relevant Union subject to the provisions of Section 7. The Fund is authorized to, and shall, access, reproduce and use such data solely for purposes of distribution of royalties collected by the Fund to the relevant persons. In its use of such data, the Fund further shall comply with the provisions of any applicable Union privacy policy of which such Union advises the Fund in writing from time to time. ...*

*6. Payment. In consideration of the foregoing, the Fund shall pay each Union, within 30 days after the conclusion of each of the Fund's distribution cycles, 3% of the amount distributed by the Fund in such distribution cycle. Each such payment shall be accompanied by a statement setting forth the computation of the payment amount. Such payment shall constitute complete compensation of the Unions and their personnel for providing the data and services contemplated by this Agreement. There shall be no additional charges or expense reimbursement associated with the Unions' provision of the data and services contemplated by this Agreement."*

A "royalty" is a payment made to an asset's owner for the use of that asset. Royalties are typically expressed (as occurs under the 2013 Agreement) as a percentage of gross or net revenues derived from the use of an asset. The payment to the Unions under the 2013 Agreement is a percentage royalty. Similarly, the dispute at issue involves the administration of music royalties, in which music performers are compensated with percentage royalties. Simply put, it should surprise no one that a percentage fee is used for the use of information needed to administer percentage-based music royalties.

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Music royalties are not earned or paid when the underlying work occurs; instead, the work precedes the payment, sometimes by years. The same is true for all of the payments to the companies described in Section A above. Yet, in this matter, Plaintiff asserts (incorrectly) that the payments made to the Unions for the use of their information are unreasonable because the amount paid in any particular year (or, the increase in the payment over the prior year's payment) is not reasonably calculated based on work uniquely performed in that year. The Plaintiff's contentions in this regard are improper as the time-based work vs. payment relationship almost never exists in royalty agreements.

## **V. OTHER INFORMATION**

### **A. QUALIFICATIONS FOR OFFERING OPINIONS**

Attached as Exhibit 1 is a copy of my curriculum vitae summarizing my education, experience and qualifications. Exhibit 1 also includes a listing of the cases in which I have testified as an expert at trial or by deposition within the preceding four years, and publications that I have authored in the last ten years.

### **B. COMPENSATION**

Fulcrum is being paid at its normal hourly rates for the persons involved in the assignment. Our compensation is not contingent on the conclusions reached or ultimate resolution of the case. My personal hourly rate is \$625.

Very truly yours,  
Fulcrum Financial Inquiry LLP

By:   
David Nolte

# **EXHIBIT 2**

TITLE ID	TITLE	ARTIST	Union Session Reports	Web Credits+Fund Credits?	Result	Total Musician \$ Distributed to Title	Total Vocalist \$ Distributed to Title	Total Both M/V \$ Distributed to Title	Musician Count w/Union Data	Musician Share w/Union Data	Vocal Count w/Union Data	Vocalist Share w/Union Data	Both M/V Count w/Union Data	Both M/V Share w/Union Data	Musician Count Web Credits	Musician Share Web Credits	Vocalist Count Web Credits	Vocalist Share Web Credits	Both M/V Count Web Credits	Both M/V Share Web Credits	Time Spent finding credits w/o Union Data	Web Credits Source(s)	Album or Track Credits Used	Researcher Comments
041624	MY HEART WILL GO ON (LOVE TIDION CELINE)		Y	No	Orchestra and music prep personnel would not receive their shares; web credit musicians would be overpaid	\$30,388.89	\$30,308.35	\$0.00	65	\$467.52	5	\$6,061.67	0	\$0.00	7	\$4,341.27	5	\$6,061.67	0	\$0.00	30 minutes	Discogs+liner notes=b/d, Tidal=d, allmusic=c album credits	track	Orch conductor and contractor credited on multi online sources (b/d) but not the orch (orch/prep on afm contracts only)
092853	CRASH MY PARTY	BRYAN LUKE	Y	No	2 session musicians would not receive their shares; web credit musicians would be overpaid	\$53,605.44	\$89,347.74	\$0.00	9	\$5,956.16	1	\$89,347.74	0	\$0.00	7	\$7,657.92	1	\$89,347.74	0	\$0.00	20 minutes	Discogs+liner notes=alb credits, Tidal=b/d, allmusic=c album credits, wiki=ab credits	track	Only one source (Tidal) w/b/d
023948	RUNNIN' DOWN A DREAM	PETTY TOM	Y	Yes	web credits match	\$51,561.85	\$0.00	\$0.00	3	\$17,187.28	0	\$0.00	0	\$0.00	3	\$17,187.28	0	\$0.00	0	\$0.00	40 minutes	Discogs=b/d on a comp, Tidal=no credits, liner notes=partial b/d, wiki=partial b/d, allmusic=ab credits	track	b/d was hidden on a comp but all three musicians were on the liner notes (not attributed to trks but other perf were so it can be assumed these three played on all ab trks)
106915	HEAD OVER BOOTS	PARDI JON	Y	No	2 Musicians would receive shares in error, diluting the shares; 1 Vocalist would not receive a share resulting in 1 Vocalist being overpaid	\$26,296.32	\$44,398.94	\$0.00	8	\$3,287.04	2	\$22,199.47	0	\$0.00	10	\$2,629.63	1	\$44,398.94	0	\$0.00	20 minutes	discogs=ab credits, liner notes=no credits, Tidal=ab credits, wiki=ab credits, allmusic=no credits	track	credit discrepancy between web/afm; 3 musicians on Tidal for trk but not on AFM and a one musician on AFM but not on web
137357	SHAKE IT OFF	KROLL NICK/REESE WITHER	Y	No	The only 2 Musicians on this trk (afm) would not receive a share and 1 vocalist would not receive a share resulting in 1 voc being overpaid	\$1,379.99	\$6,375.90	\$3,590.75	1	\$1,379.99	10	\$637.59	1	\$3,590.75	0	\$0.00	11	\$579.63	0	\$0.00	15 minutes	wiki=no credits, discogs/liner notes=voc credits b/d only/no credits, Tidal=voc credits only, allmusic=ab credits, discogs+liner notes=d, Tidal=Incomplete b/d, allmusic=ab credits	track	no b/d, musicians credited for alb (d/songs/artists),
073070	I KISSED A GIRL	PERRY KATY	Y	Yes	web credits match	\$42,087.63	\$73,963.88	\$0.00	3	\$14,029.21	1	\$73,963.88	0	\$0.00	3	\$14,029.21	1	\$73,963.88	0	\$0.00	20 minutes	discogs=b/d, liner notes=no credits, wiki=b/d, allmusic=ab credits	track	worked per discogs/liner notes b/d
021162	BABY, WHAT A BIG SURPRISE	CHICAGO	Y	No	30 session musicians would not get a share; web credits would overpay others	\$14,938.15	\$24,211.74	\$0.00	32	\$466.82	2	\$12,105.87	0	\$0.00	2	\$7,469.08	2	\$12,105.87	0	\$0.00	15 minutes	discogs=b/d, no liner notes, tidi=b/d, wiki=ab credits	track	worked per discogs/wiki b/d; missing session players
105992	SORRY	BIEBER JUSTIN	Y	Yes	web credits match	\$0.00	\$155,555.94	\$0.00	0	\$0.00	2	\$77,777.97	0	\$0.00	0	\$0.00	2	\$77,777.97	0	\$0.00	10 minutes	discogs+partial b/d, wiki=partial b/d, tidal=d/b/d, artist website=liner notes w/ partial	track	worked per discogs/tidal b/d
119370	ROUND HERE BUZZ	CHURCH ERIC	Y	No	1 perf credited as musician and bg's on album but can only receive a partial contribution on trk; as a result, he will not receive a voc share from credited from an Afra session report	\$11,737.82	\$0.00	\$26,477.18	3	\$3,912.61	0	\$0.00	1	\$26,477.18	4	\$2,934.46	0	\$0.00	0	\$0.00	25 minutes	discogs & liner notes=b/d for orchestra only, orches=partial b/d, Tidal=b/d, youtube topic=d/b/d	track	tidal=b/d but still one voc straggler on alb; other sources=partial b/d
119679	I BELIEVE IN YOU	BUBLE MICHAEL	Y	No	8 Music prep and 1 Musician from union session reports not listed in web credits would not get paid and others would get overpaid	\$10,150.64	\$12,630.30	\$3,972.84	55	\$184.56	2	\$6,315.15	1	\$9,972.84	46	\$220.67	2	\$6,315.15	1	\$3,972.84	45 minutes	Discogs+liner notes=d, Tidal=found, no b/d but attached liner notes with b/d, wiki=ab credits b/d, allmusic=ab credits	track	Missing Strings+ check with KP
134728	WOMAN, AMEN	BENTLEY DIERKS	Y	Yes	liner notes match Union	\$9,414.84	\$8,683.29	\$10,252.43	6	\$1,569.14	1	\$8,683.29	1	\$10,252.43	6	\$1,569.14	1	\$8,683.29	1	\$10,252.43	16 minutes	Discogs+liner notes=d, Allmusic=ab credits, YouTube Topic=d, Tidal=Topic+liner notes cna, wiki indicates trk instrumentation was all by producer, can't verify, worked as cna	track	worked per liner notes
092752	CHILLIN' IT	SWINDELL COLE	Y	No	Album credits dilute Shares	\$6,536.99	\$92,457.05	\$0.00	1	\$6,536.99	1	\$92,457.05	0	\$0.00	8	\$726.33	3	\$23,114.26	1	\$23,840.59	30 minutes	Discogs+liner notes=d, Allmusic=ab credits, Topics=Tidal+trk b/d	Album	can't confirm wiki as only source indicating producer Jody Stevens played all the instruments on single, worked as cna per Tidal, Wiki & allmusic album credits
107027	T-SHIRT	RHETT THOMAS	Y	No	Album credits dilute Shares	\$28,986.60	\$49,242.62	\$0.00	6	\$4,831.10	2	\$24,621.31	0	\$0.00	13	\$1,932.44	2	\$12,310.66	2	\$14,243.10	15 minutes	Genius+no credits found	Album	no b/d, worked as cna
018050	UN-BREAK MY HEART	BRAXTON TONI	Y	Yes	liner notes match Union	\$24,132.60	\$38,705.33	\$0.00	4	\$6,033.15	1	\$38,705.33	0	\$0.00	4	\$6,033.15	1	\$38,705.33	0	\$0.00	12 min	Discogs+partial b/d (no lns) Total/Topic+partial b/d allmusic=ab credits wili=partial b/d genius=partial b/d Discogs+no credits d/b, no LN Tidal/Topic+track b/d allMusic+ab credits wiki=ab credits genius=nothing Discogs+partial trk+ab Pandora+partial trk+ab Allmusic+ab credits	track	trk b/ds avail per liner notes and web
016959	UNWELL	MATCHBOX 20	Y	Yes	web credits match	\$63,861.28	\$0.00	\$0.00	4	\$15,965.32	0	\$0.00	0	\$0.00	4	\$15,965.32	0	\$0.00	0	\$0.00	18 min	Discogs+trk b/d (no lns) Total/Topic+partial b/d Allmusic+ab credits wili=partial b/d genius=partial b/d Discogs+partial trk+ab Pandora+partial trk+ab Allmusic+ab credits	track	would Want to confirm prod and contrct: partial trk b/d avail per Discogs only, all other web sources leave out the prod+contrct entirely
114036	THINK A LITTLE LESS	RAY MICHAEL	Y	Yes	web credits match session players not on web credits would not get a share and others would be overpaid	\$18,392.57	\$30,898.85	\$0.00	7	\$2,627.51	1	\$30,898.85	0	\$0.00	7	\$2,627.51	1	\$30,898.85	0	\$0.00	10 min	Discogs+partial trk+ab (no lns) Total/Topic+partial b/d allMusic+ab credits wiki=ab credits genius=nothing Discogs+partial trk+ab Pandora+partial trk+ab Allmusic+ab credits	track	b/d on Tidal/Topics only
147447	READY TO LET GO	CAGE THE ELEPHANT	Y	No	session players not on web credits would not get a share and others would be overpaid	\$4,502.60	\$6,590.88	\$0.00	1	\$4,502.60	9	\$732.32	0	\$0.00	1	\$4,502.60	1	\$6,590.88	0	\$0.00	15 minutes	Discogs+trk+ab (no lns) Total/Topic+partial b/d Allmusic+ab credits wili=partial b/d missing some in error - not track specific	Album	L.A. & nville; given useless partial b/d, any contracts would be helpful
092857	THAT'S MY KIND OF NIGHT	BRYAN LUKE	Y	No	Album credits dilute Shares	\$49,064.40	\$82,453.38	\$0.00	7	\$7,009.20	1	\$82,453.38	0	\$0.00	15	\$3,270.96	4	\$20,613.35	0	\$0.00	13	Allmusic+ab Discogs+INT, ab only Pandora+partial Praguefrank+album Allmusic+ab credits	Album	Need nville contracts for track b/ds
018758	DOWN ON THE FARM	MCGRAW TIM	Y	No	Album credits dilute Shares	\$27,348.54	\$46,397.28	\$0.00	6	\$4,558.09	2	\$23,198.64	0	\$0.00	12	\$2,279.05	2	\$23,198.64	0	\$0.00	12	Discogs+trk b/d (no lns) Total/Topic+partial b/d Allmusic+ab credits	Album	Album Credits dilute session credits; Need nville contracts for track b/ds
018061	BOOTS ON	HOUSER RANDY	Y	No	session players not on web credits would not get a share and others would be overpaid	\$32,245.36	\$53,669.02	\$0.00	14	\$2,303.24	1	\$53,669.02	0	\$0.00	8	\$4,030.67	1	\$53,669.02	0	\$0.00	15 minutes	Discogs+trk+ab (no lns) Total/Topic+partial b/d Allmusic+ab credits wili=partial b/d	track	new trk b/d found in discogs (only): without discogs this would've been album credits
091614	RADIOACTIVE	IMAGINE DRAGONS	Y	Yes	web credits match	\$159,600.67	\$0.00	\$0.00	1	\$159,600.67	0	\$0.00	0	\$0.00	1	\$159,600.67	0	\$0.00	0	\$0.00	15 minutes	Discogs+partial b/d+liner notes Total/Topic+missing credits; Allmusic+ab credits wili=partial b/d	track	trk b/ds available across web
021529	VENTURA HIGHWAY	AMERICA	Y	Yes	liner notes match Union	\$41,725.79	\$0.00	\$0.00	2	\$20,862.90	0	\$0.00	0	\$0.00	2	\$20,862.90	0	\$0.00	0	\$0.00	18 minutes	Discogs+partial b/d+liner notes Total/Topic+ab Allmusic+ab credits wili=partial b/d	track	liner notes provide partial b/d, eliminated adding extra musician credits wili=trk credits

7286	JUST A KISS	LADY ANTEBELLUM	Y	No	1 Musician would get a share in error and dilute other shares	\$74,387.52	\$0.00	\$0.00	23	\$3,234.24	0	\$0.00	0	\$0.00	24	\$3,099.48	0	\$0.00	0	\$0.00	45 minutes	Discogs-no b/d or LNs; Tidal/topic=+nothing Allmusic=+b credits=+24mus wikitrk b/d+22mus genius/b/d+20mus	Could use L257 here: Made c=a after comparing to the two b/ds found: c=a seemed safer VS using the wiki or genius b/ds, both of which did not match each other.
2690	GET ME SOME OF THAT	RHETT THOMAS	Y	No	Album credits dilute Shares	\$48,701.84	\$82,264.05	\$0.00	11	\$4,427.44	1	\$82,264.05	0	\$0.00	24	\$1,803.77	19	\$3,739.28	3	\$5,543.05	35 minutes	Discogs-b/d or liner notes Tidal/topic=+b/d, +alt+genius=+b/d, +wiki+alb credits=+genius/b/d?	ALBUM CREDITS DILUTE SHARES: need union, esp ATTRA=+album credits ONLY (did not use b/d found only on Genius: seemed incomplete w/o source cited)
7411	WE WERE	URBAN KEITH	Y	Yes	web credits match	\$4,430.05	\$6,484.64	\$0.00	5	\$886.01	1	\$6,484.64	0	\$0.00	5	\$886.01	1	\$6,484.64	0	\$0.00	12 minutes	Discogs-b/d or LNs (no strings just arrp/comp) Tidal/topic=+b/d or strings allmusic=+b/d credits=+track b/d genius=+nothing	track web b/ds found
7296	ROCK WITH YOU	JACKSON MICHAEL	Y	No	Session Players would not get a share and others would get overpaid	\$56,393.19	\$506.03	\$1,187.03	49	\$1,150.88	0	\$0.00	0	\$0.00	15	\$3,759.55	0	\$0.00	0	\$0.00	20 minutes	Discogs-partial b/d and LNs (no strings allmusic=+b/d credits=+no strings genius/b/d)	need L47 for audible strings=n/f (liner notes found with b/d, only (partial - need st arrg/ conductor)
2003	DON'T TAKE THE GIRL	MCGRAW TIM	Y	No	Album credits dilute Shares	\$27,293.60	\$45,947.54	\$0.00	8	\$3,411.70	2	\$22,973.77	0	\$0.00	12	\$2,274.47	2	\$22,973.77	0	\$0.00	12 minutes	Discogs-liner notes=+b/d credits Tidal/topic=+b/d or strings allmusic=+b/d credits=+pandora=+nothing	album need L257: album credits found only (liner notes)
7565	CLOSING TIME	SEMISONIC	Y	Yes	web credits match	\$66,101.45	\$0.00	\$0.00	5	\$13,220.29	0	\$0.00	0	\$0.00	5	\$13,220.29	0	\$0.00	0	\$0.00	15 minutes	Discogs-liner notes=+partial b/d: entered all strings per audio, Tidal/topic=+nothing: allmusic=+b/d credits=+genius=+trk b/d	could use L47 union here for strings: partial trk breakdown found - (partial + cna str all fe 5 strings cna entered per audio)
9225	THE EDGE OF GLORY	LADY GAGA	Y	Yes	web credits match	\$42,518.66	\$0.00	\$0.00	4	\$10,629.67	0	\$0.00	0	\$0.00	4	\$10,629.67	0	\$0.00	0	\$0.00	11 min	Discogs=+Album Credits, +Wiki=+Album Credits, +Allmusic=+Album Credits, +Wikifound=+b/d, +Wikitrk=+b/d	track web b/ds found
9048	THERE GOES MY LIFE	CHESNEY KENNY	Y	Yes	web credits match	\$34,517.75	\$58,623.10	\$0.00	8	\$4,314.72	2	\$29,311.55	0	\$0.00	8	\$4,314.72	2	\$29,311.55	0	\$0.00	16 minutes	Discogs=+found=+b/d, +Allmusic=+found=+b/d, +Wikifound=+b/d, +Wikitrk=+b/d	Track only b/d down found was youtube topic, can't confirm secondary source for b/d - used
4585	DRUNK GIRL	JANSON CHRIS	Y	Yes	web credits match	\$10,035.55	\$15,821.83	\$0.00	7	\$1,433.65	1	\$15,821.83	0	\$0.00	7	\$1,433.65	1	\$15,821.83	0	\$0.00	15 minutes	Discogs=+found=+b/d, +Allmusic=+found=+b/d, +Wikifound=+b/d, +Wikitrk=+b/d	Track web b/d found, liner notes=n/f
0973	KICK THE DUST UP	BRYAN LUKE	Y	No	session players not on web credits	\$29,051.82	\$48,899.07	\$0.00	11	\$2,641.07	1	\$48,899.07	0	\$0.00	7	\$3,227.98	1	\$16,299.69	2	\$19,527.67	22 minutes	Discogs=+partial b/d, found=+b/d, +Wikifound=+b/d, +Wikitrk=+b/d	Track Bass player incorrectly labeled as Bass (vocalist) on youtube topic, expert researcher knows performer as bassist, tidal=+d confirms Stios as bass only
8263	HOME	BUBLE MICHAEL	Y	No	session players not on web credits	\$41,889.22	\$68,709.96	\$0.00	47	\$891.26	1	\$68,709.96	0	\$0.00	12	\$3,490.77	1	\$68,709.96	0	\$0.00	30 minutes	Discogs=+found=+b/d, +Allmusic=+found=+b/d credits only, youtube topic=+found=+b/d, Genius=+no credits found, Tidal=+partial b/d found=+b/d, +Wikifound=+b/d, +Wikitrk=+b/d	Track (partial) Audible strings, no orch credits found, need to verify; discrepancies with musician b/d; Tidal doesn't list Bill Ross as a Arranger, He is clearly listed on liner notes, added; added string contractors per liner notes, need string performers
5963	YOU SHOULD BE HERE	SWINDELL COLE	Y	Yes	web credits match	\$28,911.23	\$49,059.51	\$0.00	8	\$3,613.90	1	\$49,059.51	0	\$0.00	8	\$3,613.90	1	\$49,059.51	0	\$0.00	20 minutes	Discogs=+b/d found=+b/d	Track tidal & youtube topic b/d appear to be c=a, used this per multiple sources
7209	IT DON'T HURT LIKE IT USED TO	CURRINGTON BILLY	Y	No	Album credits dilute Shares	\$23,245.23	\$39,316.89	\$0.00	8	\$2,905.65	1	\$39,316.89	0	\$0.00	12	\$1,937.10	2	\$19,658.45	0	\$0.00	20 minutes	Discogs=+found=+partial b/d, liner notes=+found=+b/d, +Wikifound=+b/d, +Wikitrk=+b/d	Album Youtube Topic & Tidal "b/d" appear to be C=A (ex. two bass players, everyone from album credits credited), essentially worked as C=A
8049	ALRIGHT	RUCKER DARIUS	Y	No	1 Musician would not receive a share and others would get overpaid	\$39,030.50	\$64,939.28	\$0.00	10	\$3,903.05	1	\$64,939.28	0	\$0.00	9	\$4,336.72	1	\$64,939.28	0	\$0.00	16 minutes	Discogs=+found=+b/d, liner notes=+found=+b/d, +Wikifound=+b/d, +Wikitrk=+b/d	Track Credits Used liner notes as main source for trk b/d, no other b/d sources found (Discogs b/d+liner notes)
8679	5-1-5-0	BENTLEY DIERKS	Y	No	Web Album credits dilute shares	\$37,990.28	\$63,190.52	\$0.00	8	\$4,748.79	1	\$63,190.52	0	\$0.00	24	\$1,519.61	8	\$7,021.17	1	\$8,540.78	30 minutes	Discogs=+found=+b/d, liner notes=+found=+b/d, +Wikifound=+b/d	Album
0269	BEAT IT	JACKSON MICHAEL	Y	Yes	Web credits result in one musician not receiving a share and others would be overpaid	\$49,906.42	\$0.00	\$34.46	10	\$4,990.64	0	\$0.00	0	\$0.00	9	\$5,545.16	0	\$0.00	0	\$0.00	24 minutes	Discogs=+b/d+ liner notes, Wikifound=+b/d from liner notes, Allmusic=+b/d credits, liner notes=+found=+b/d	Track worked per liner notes & web sources
9760	GIMMIE THAT GIRL	NICHOLS JOE	Y	No	Web Album credits dilute shares	\$31,506.03	\$52,809.70	\$0.00	9	\$3,500.67	2	\$26,404.85	0	\$0.00	8	\$3,938.25	2	\$26,404.85	0	\$0.00	15 minutes	Discogs=+no credits, +Wikifound=+b/d, +Wikitrk=+b/d	Track worked per liner notes & web sources
9322	EVERY LITTLE THING	PEARCE CARLY	Y	No	Web Album credits dilute shares	\$14,794.72	\$24,440.93	\$0.00	3	\$4,931.57	1	\$24,440.93	0	\$0.00	11	\$1,344.97	6	\$4,073.49	0	\$0.00	12 minutes	Discogs=+track b/d & LNs, +Wikifound=+b/d, +Wikitrk=+b/d	Album Likely a nashville title by participants, label, & genre; would benefit from a 257 search and affra
0476	I'LL HAVE TO SAY I LOVE YOU IN	CROCE JIM	Y	No	Web Album credits dilute shares	\$25,099.67	\$40,708.45	\$0.00	20	\$1,254.98	1	\$40,708.45	2	\$0.00	4	\$5,019.93	2	\$13,569.48	1	\$18,588.81	10 minutes	Discogs=+b/d & LNs, +Wikifound=+b/d, +Wikitrk=+b/d	Track
1507	WHATEVER SHE'S GOT	NAIL DAVID	Y	No	Web Album credits dilute shares	\$52,817.50	\$89,397.24	\$0.00	6	\$8,802.92	1	\$89,397.24	0	\$0.00	11	\$4,801.59	13	\$6,876.71	0	\$0.00	15 minutes	Discogs=+b/d & LNs, +Wikifound=+b/d, +Wikitrk=+b/d	Album Nashville title; would benefit from a 257 search and affra

092520	RUNNIN' OUTTA MOONLIGHT	HOUSER RANDY	Y	No	Web Album credits dilute shares 2 Vocals on union session reports would not have been paid for song	\$57,599.63	\$96,450.21	\$0.00	9	\$6,399.96	1	\$96,450.21	0	\$0.00	17	\$3,388.21	4	\$24,112.55	0	\$0.00	11	Discogs=alb credits Allmusic=alb credits Pandora=nothing Praguefrank=alb credits Discogs=alb credits Allmusic=album credits Pandora=track credits Genius=nothing Discogs=track b/ds & LNTs Allmusic=alb creds Pandora=trk creds Discogs=alb credits Allmusic=alb creds Pandora=trk creds Praguefrank=alb creds	Album	Nashville title; would benefit from a 257 search and after
100612	LOCKED AWAY	R. CITY FT ADAM LEVINE	Y	No	Web Credits dilute shares	\$8,000.42	\$112,580.11	\$0.00	2	\$4,000.21	2	\$56,290.06	0	\$0.00	1	\$8,000.42	1	\$112,580.11	0	\$0.00	13	Discogs=alb credits Allmusic=alb credits Pandora=partial	Track	
134629	SAY AMEN (SATURDAY NIGHT)	PANIC AT THE DISCO	Y	No	Web Credits dilute shares	\$10,221.64	\$11,207.10	\$5,996.69	26	\$393.14	2	\$5,603.55	1	\$5,996.69	37	\$268.99	2	\$3,735.70	1	\$5,996.69	16	Discogs=alb credits Allmusic=alb creds Pandora=partial al Track partial al L.A. - AFM for strings would help		
119359	FLATLINER	SWINDELL COLE FT DIERKS	Y	Yes	Web credits match Web credits would cause overpayment of some: 21 musicians to not receive their shares; 8 vocalists would not get their shares	\$14,666.83	\$24,517.34	\$0.00	7	\$2,095.26	1	\$24,517.34	0	\$0.00	7	\$2,095.26	1	\$24,517.34	0	\$0.00	13	Discogs=alb credits Allmusic=alb creds Pandora=partial Praguefrank=alb creds	Track	Nashville title; would benefit from a 257 search and after
088823	HOLLY JOLLY CHRISTMAS	BUBLE MICHAEL	Y	No	Web credits match	\$20,207.65	\$33,497.76	\$0.00	29	\$696.82	8	\$4,187.22	0	\$0.00	8	\$2,525.96	0	\$0.00	0	\$0.00	15	Discogs=track + LNTs Pandora=partial Allmusic=no reason Discogs=LNTs Pandora=partial alb? Did not use Allmusic=album	Partial Track	L.A.; can't determine orchestra without a contract
079697	REMIND ME	PAISLEY BRAD/CARRIE UNC	Y	Yes	Web credits match	\$40,362.00	\$67,509.04	\$0.00	6	\$6,727.00	2	\$33,754.52	0	\$0.00	6	\$6,727.00	2	\$33,754.52	0	\$0.00	17	Discogs=track & LNTs Pandora=track Allmusic=album	Track	Pandora includes 1 extra musician and vocalist; would check against Nville contracts
146827	CONSEQUENCES	CABELLO CAMILA	Y	Yes	Web credits match	\$10,437.75	\$0.00	\$0.00	1	\$10,437.75	0	\$0.00	0	\$0.00	1	\$10,437.75	0	\$0.00	0	\$0.00	8	Discogs=alb credits Pandora=track Allmusic=album	Track	
079749	CRAZY GIRL	ELI YOUNG BAND	Y	Yes	Web credits match	\$69,978.39	\$0.00	\$0.00	6	\$11,663.07	0	\$0.00	0	\$0.00	6	\$11,663.07	0	\$0.00	0	\$0.00	13	Discogs=alb credits Pandora=track Allmusic=album	Track	

TITLE ID	TITLE	ARTIST	Participant Count	# Participants located from Union Member Directory	# Participants with valid Address/SSN who are not in Union Directory	# Participants without a Valid Address or SSN as of 1/29/21
041624	MY HEART WILL GO ON (LOVE THEME FROM TITANIC)	DION CELINE	70	68	2	0
092853	CRASH MY PARTY	BRYAN LUKE	10	10	0	0
023948	RUNNIN' DOWN A DREAM	PETTY TOM	3	3	0	0
106915	HEAD OVER BOOTS	PARDI JON	10	10	0	0
137357	SHAKE IT OFF	KROLL NICK/REESE WITHERSPOON	12	11	0	1
073070	I KISSED A GIRL	PERRY KATY	4	4	0	0
021162	BABY, WHAT A BIG SURPRISE	CHICAGO	34	25	9	0
105992	SORRY	BIEBER JUSTIN	2	1	1	0
119370	ROUND HERE BUZZ	CHURCH ERIC	4	4	0	0
119679	I BELIEVE IN YOU	BUBLE MICHAEL	58	56	1	1
134728	WOMAN, AMEN	BENTLEY DIERKS	8	8	0	0
092752	CHILLIN' IT	SWINDELL COLE	2	2	0	0
107027	T-SHIRT	RHETT THOMAS	8	8	0	0
018050	UN-BREAK MY HEART	BRAXTON TONI	5	4	1	0
016959	UNWELL	MATCHBOX 20	4	4	0	0
114036	THINK A LITTLE LESS	RAY MICHAEL	8	8	0	0
147447	READY TO LET GO	CAGE THE ELEPHANT	10	7	1	2
092857	THAT'S MY KIND OF NIGHT	BRYAN LUKE	8	8	0	0
018758	DOWN ON THE FARM	MCGRAW TIM	8	8	0	0
018061	BOOTS ON	HOUSER RANDY	15	15	0	0
091614	RADIOACTIVE	IMAGINE DRAGONS	1	0	0	1
021529	VENTURA HIGHWAY	AMERICA	2	2	0	0
087286	JUST A KISS	LADY ANTEBELLUM	23	23	0	0
092690	GET ME SOME OF THAT	RHETT THOMAS	12	12	0	0
147411	WE WERE	URBAN KEITH	6	6	0	0
017296	ROCK WITH YOU	JACKSON MICHAEL	49	42	6	1
020003	DON'T TAKE THE GIRL	MCGRAW TIM	10	10	0	0
017565	CLOSING TIME	SEMISONIC	5	5	0	0
079225	THE EDGE OF GLORY	LADY GAGA	4	2	2	0
019048	THERE GOES MY LIFE	CHESNEY KENNY	10	10	0	0
134585	DRUNK GIRL	JANSON CHRIS	8	8	0	0
100973	KICK THE DUST UP	BRYAN LUKE	12	12	0	0
018263	HOME	BUBLE MICHAEL	48	46	2	0
106963	YOU SHOULD BE HERE	SWINDELL COLE	9	8	1	0
107209	IT DON'T HURT LIKE IT USED TO	CURRINGTON BILLY	9	9	0	0
018049	ALRIGHT	RUCKER DARIUS	11	11	0	0

088679	5-1-5-0	BENTLEY DIERKS	9	9	0	0
020269	BEAT IT	JACKSON MICHAEL	10	10	0	0
039760	GIMMIE THAT GIRL	NICHOLS JOE	11	11	0	0
119322	EVERY LITTLE THING	PEARCE CARLY	4	4	0	0
020476	I'LL HAVE TO SAY I LOVE YOU IN A SONG	CROCE JIM	23	18	5	0
091507	WHATEVER SHE'S GOT	NAIL DAVID	7	7	0	0
092520	RUNNIN' OUTTA MOONLIGHT	HOUSER RANDY	10	10	0	0
100612	LOCKED AWAY	R. CITY FT ADAM LEVINE	4	4	0	0
134629	SAY AMEN (SATURDAY NIGHT)	PANIC AT THE DISCO	29	28	1	0
119359	FLATLINER	SWINDELL COLE FT DIERKS BENTLEY	8	8	0	0
088823	HOLLY JOLLY CHRISTMAS	BUBLE MICHAEL	37	36	1	0
079697	REMIND ME	PAISLEY BRAD/CARRIE UNDERWOOD	8	8	0	0
146827	CONSEQUENCES	CABELLO CAMILA	1	0	1	0
079749	CRAZY GIRL	ELI YOUNG BAND	6	6	0	0

# **EXHIBIT 3**

15 CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

16

17 Tuesday, April 27, 2021

18

19

25

Page 2			Page 4
1 REMOTE APPEARANCES:			1 INDEX TO EXHIBITS
2 For Plaintiffs:			2
3 KIESEL LAW LLP			3
4 BY: MARIANA McCONNELL, ESQ.			4 MARKED
5 NICHOLAS BRANCOLINI, ESQ.			5 Exhibit 1 Curriculum vitae
6 8648 Wilshire Boulevard			6 Exhibit 2 Fulcrum Financial Inquiry LLP
7 Beverly Hills, California 90211			7 invoices
8 (310) 854-4444			8 Bates Nos. NOLTE00000006 -
9 mcconnell@kiesel.law			9 00000009, 00000001 - 00000005,
10 brancolini@kiesel.law			10 00001228 - 00001229
11 JOHNSON AND JOHNSON, LLP			11 Exhibit 3 Fulcrum Inquiry retention
12 BY: DANIEL B. LIFSCHITZ, ESQ.			12 agreement
13 439 North Canon Drive			13 Bates Nos. NOLTE00000011 -
14 Beverly Hills, California 90210			14 00000016, 00000010
15 (310) 975-1080			15
16			16 Exhibit 4 Fulcrum Inquiry report
17 For Defendants:			17 No Bates Nos.
18 JENNER & BLOCK			18 Exhibit 5 Article entitled "Steps In
19 BY: ANDREW THOMAS, ESQ.			19 Valuing Intellectual Property"
20 ANDREW G. SULLIVAN, ESQ.			20 No Bates Nos.
21 633 West 5th Street, Suite 3600			21
22 Los Angeles, California 90071			22
23 (213) 239-5155			23
24 ajthomas@jenner.com			24
25 agsullivan@jenner.com			25
Page 3			Page 5
1 INDEX TO EXAMINATION			1 LOS ANGELES, CALIFORNIA
2			2 TUESDAY, APRIL 27, 2021, 9:08 A.M.
3 WITNESS: DAVID NOLTE			3
4			4 THE VIDEOGRAPHER: We are now on the record.
5 Examination By Ms. McConnell			5 My name is David Kim. I'm a videographer for Golkow
6			6 Litigation Services.
7			7 Today's date is April 27, 2021, and the time
8			8 is 9:08 a.m.
9			9 This remote video deposition is being held in
10 the matter of Risto v. Screen Actors Guild-American			10 Federation of Television and Radio Artists for the
11			11 Superior Court -- no -- for the U.S. District Court
12			12 for the Central District of California.
13			13 The deponent is David Nolte.
14			14 All parties to this deposition are appearing
15			15 remotely and have agreed to the witness being sworn in
16			16 remotely.
17			17 Due to the nature of remote reporting, please
18			18 pause briefly before speaking to ensure all parties
19			19 are heard completely.
20			20 Will counsel please identify themselves.
21			21 MS. McCONNELL: Mariana McConnell from Kiesel
22			22 Law for plaintiff and the class.
23			23 MR. BRANCOLINI: Nico Brancolini from Kiesel
24			24 Law on behalf of plaintiff and the class.
25			25

<p>1        MR. LIFSHITZ: Daniel Lifschitz from Johnson 2 and Johnson on behalf of plaintiff and the class.</p> <p>3        MR. THOMAS: A.J. Thomas from Jenner &amp; Block 4 on behalf of the defendants.</p> <p>5        MR. SULLIVAN: Andrew Sullivan from Jenner &amp; 6 Block on behalf of the defendants.</p> <p>7        THE VIDEOGRAPHER: The court reporter is 8 Shari Bolton, and she will now swear in the witness. 9</p> <p>10        DAVID NOLTE, 11 having been first duly sworn, was examined and 12 testified as follows:</p> <p>13</p> <p>14            EXAMINATION</p> <p>15        BY MS. McCONNELL:</p> <p>16        Q Good morning. Can you please say and spell 17 your name for the record, please.</p> <p>18        A My name is David Nolte. Nolte is spelled 19 N-o-l-t-e.</p> <p>20        Q Okay. Good morning, Mr. Nolte. I'm Mariana 21 McConnell. I'm one of the plaintiff lawyers in this 22 case, and I'm going to be asking you questions this 23 morning.</p> <p>24        How many times have you had your deposition 25 taken.</p>	<p>Page 6</p> <p>1        Q That's great. 2        Have you ever had your deposition taken 3 before Zoom before?</p> <p>4        A Yes.</p> <p>5        Q Okay. When was your last deposition?</p> <p>6        A Oh, I'd have to look it up. A couple weeks 7 ago.</p> <p>8        Q Okay. Are you currently at your home?</p> <p>9        A Yes.</p> <p>10        Q And is that in Los Angeles County?</p> <p>11        A Yes.</p> <p>12        Q Okay. I will assume that no other person is 13 in your home office with you currently, correct?</p> <p>14        A No one's in this room, that is correct.</p> <p>15        Q Perfect.</p> <p>16        I will ask that you do not have any open 17 means of communication with any of the defense lawyers 18 in this case, by that I mean text message, Slack, 19 Facebook Messenger, anything else.</p> <p>20        Will you accept that?</p> <p>21        A Oh, yeah, I have no intention of doing 22 anything like that.</p> <p>23        Q Perfect.</p> <p>24        Before we get started I want to establish 25 some shorthand for us.</p>
<p>1        A Numerous times.</p> <p>2        Q More than 50?</p> <p>3        A Yes.</p> <p>4        Q More than 100?</p> <p>5        A Yes.</p> <p>6        Q Okay. I'm going to assume you're familiar 7 with admonitions and I don't need to go through them 8 for today; is that correct?</p> <p>9        A That is your assumption, yes.</p> <p>10        Q Okay. Are you familiar with the admonitions 11 for a deposition?</p> <p>12        A I'm not a lawyer. But -- but I don't have 13 any questions, if that's what you're asking me.</p> <p>14        Q Sure.</p> <p>15        I'll remind you that you're under oath today 16 so you need to give full and complete and truthful 17 testimony, okay?</p> <p>18        A Sure.</p> <p>19        Q Great.</p> <p>20        I don't want you to guess at anything, but 21 I'm entitled to your full knowledge, so if you 22 understand my question, even a part of it, then I will 23 expect you to give an answer to it, okay?</p> <p>24        A I'll do my best to answer your questions as I 25 understand them.</p>	<p>Page 7</p> <p>1        I'm going to be asking you questions about 2 the AFM and SAG-AFTRA Intellectual Property Rights 3 Distribution Fund. I'm going to refer to that as the 4 Fund. Will you understand what I mean when I say "the 5 Fund"?</p> <p>6        A I think so, yes.</p> <p>7        Q You're familiar with the AFM and SAG-AFTRA 8 Intellectual Property Rights Distribution Fund, 9 correct?</p> <p>10        A Yes.</p> <p>11        Q If I say "the unions," will you understand 12 I'm referring to AFM and SAG-AFTRA?</p> <p>13        A Sure.</p> <p>14        Q And if I say "services agreement," will you 15 understand that I'm referring to the data purchase and 16 service agreement entered in July of 2013?</p> <p>17        A I don't have the date memorized. I could 18 look it up in my report. But whatever that subject 19 agreement is, sure.</p> <p>20        Q And if I say "service fee," will you 21 understand that I'm referring to the 3 percent 22 combined fee paid to the AFM and SAG-AFTRA unions 23 under the terms of the services agreement?</p> <p>24        A I do understand that you're -- you're 25 plaintiff and you have referred to it that way, yes.</p>

<p>1 Q Are you familiar with the fact that employees 2 of the Fund refer to it that way?</p> <p>3 A I'm not a fact witness, and I'm not an 4 employee at the Fund.</p> <p>5 Q Have you seen any e-mails between employees 6 of the Fund that refer to it as the service fee?</p> <p>7 A I haven't looked with that in mind so I don't 8 know.</p> <p>9 Q Okay. Have you -- have you read any 10 depositions where the trustees of the Fund refer to it 11 as the service fee?</p> <p>12 A Well, I know that your firm, or the 13 plaintiff, has consistently referred to it in that 14 fashion so I don't doubt that they have answered your 15 questions that use that term.</p> <p>16 Q Okay. Are -- are you familiar with the fact 17 that the defendant trustees used that term themselves? 18 That's a yes-or-no question.</p> <p>19 A I couldn't tell you. So I -- maybe they do. 20 Maybe they don't. I -- I haven't studied that. I 21 don't have any opinions in that regard.</p> <p>22 Q Okay. So you don't know.</p> <p>23 Okay. We'll take a five- to ten-minute break 24 every hour, but if you need to take a break sooner 25 just let me know, okay?</p>	<p>Page 10</p> <p>1 Q Okay. So did you undertake your best efforts 2 to find all documents relating to our categories of 3 request and produce them to Jenner &amp; Block?</p> <p>4 A Yeah, I probably should look at it again just 5 because I get a lot of these production requests so I 6 don't really have this production request in mind.</p> <p>7 But I did give to Jenner &amp; Block items that I 8 understood would be produced to you. And I -- from my 9 perspective, the production was complete. But if you 10 want to ask me more specific questions I should look 11 at it again because I haven't looked at it since it 12 was first received.</p> <p>13 Q We didn't receive any handwritten notes in 14 your production. Is it true that you don't have any 15 handwritten notes in your file?</p> <p>16 A I do not have any handwritten notes in my 17 file.</p> <p>18 Q Do you have any typed-up notes in your file?</p> <p>19 A That can't be answered yes or no without 20 being misleading. So I can give you a narrative 21 answer. But I suspect the way you're -- you're 22 expecting the answer to come out the answer would be 23 no.</p> <p>24 Q Okay. How about in a truthful answer from 25 you, do you have any type --</p>
<p>Page 11</p> <p>1 A Sure.</p> <p>2 Q Did you review your notice of deposition and 3 the request for production of documents that 4 accompanied it?</p> <p>5 A Yes.</p> <p>6 Q Okay. Did you undertake your best efforts to 7 find all documents relating to the categories of the 8 request and produce them to your counsel?</p> <p>9 A Well, I don't have a counsel so I guess the 10 answer would have to be no.</p> <p>11 Q Okay. Are you being represented for your 12 deposition today by Jenner &amp; Block?</p> <p>13 A Not to my knowledge. They don't represent 14 me. They represent others.</p> <p>15 Q Okay. Are they going to be interposing 16 objections on your behalf during this deposition?</p> <p>17 MR. THOMAS: Well, Counsel, we'll definitely 18 be interposing objections because we're a party to the 19 case and if we feel a question's improper, we'll note 20 that for the record. We'd have that right, you know, 21 regardless of whether we represent the witness or not.</p> <p>22 BY MS. McCONNELL:</p> <p>23 Q Did the firm of Jenner &amp; Block handle the 24 production of documents on your behalf?</p> <p>25 A They did.</p>	<p>Page 13</p> <p>1 A Okay. I don't understand your question.</p> <p>2 Q Okay.</p> <p>3 A We'll do it that way. I don't understand 4 your question.</p> <p>5 Q Great.</p> <p>6 Did you -- you reviewed depositions in this 7 case, right?</p> <p>8 A I did.</p> <p>9 Q Did you take any notes on the depositions 10 that you reviewed?</p> <p>11 A Yes.</p> <p>12 Q Did you handwrite them?</p> <p>13 A No.</p> <p>14 Q Did you type them up?</p> <p>15 A Yes.</p> <p>16 Q Did you maintain those typed-up notes in your 17 file?</p> <p>18 A Yes.</p> <p>19 Q Were those typed-up notes given to Jenner &amp; 20 Block?</p> <p>21 A Yes.</p> <p>22 Q Okay. Those were not produced to us. Do you 23 have any reason to know why or why not?</p> <p>24 A Oh, I suspect you actually do have them.</p> <p>25 You're making an assumption in your assertion just a</p>

<p>1 moment ago.</p> <p>2 Q Okay. You're assuming that I do have your</p> <p>3 typed-up notes for the depositions?</p> <p>4 A I'm not making any assumption at all. Let</p> <p>5 me -- let me try to help you out.</p> <p>6 Do you have my report?</p> <p>7 Q Yes.</p> <p>8 A Do you have my report?</p> <p>9 Q I do.</p> <p>10 A I -- I suspected you did because you engaged</p> <p>11 three experts to write a report about it. Whatever</p> <p>12 notes I had were incorporated into that report.</p> <p>13 MS. McCONNELL: Okay. Nico, can you send him</p> <p>14 his CV, please, on Zoom.</p> <p>15 And we'll mark it as Exhibit 1, please.</p> <p>16 (Exhibit 1 marked.)</p> <p>17 BY MS. McCONNELL:</p> <p>18 Q Okay. Mr. Nolte, it's in the chat function,</p> <p>19 and we can share it with you as well. I don't</p> <p>20 think -- well, whatever, you can open it on your own</p> <p>21 or you can look on the screen.</p> <p>22 A I'm looking on the screen.</p> <p>23 Q Great.</p> <p>24 Is this the most recent version of your CV?</p> <p>25 A Well, at first, I can't see all of it, but</p>	<p>Page 14</p> <p>1 major in accounting also required effectively a major</p> <p>2 in business so I guess maybe I had three majors. But</p> <p>3 that's what I -- that's what I ended up taking.</p> <p>4 Q Great.</p> <p>5 You have an MBA from Cal State L.A.?</p> <p>6 A I do.</p> <p>7 Q And you graduated in 1982?</p> <p>8 A Yes.</p> <p>9 Q Do you have any -- strike that.</p> <p>10 You've been a certified public accountant</p> <p>11 since 1979, correct?</p> <p>12 A Right. The board approved my application in</p> <p>13 January of that year.</p> <p>14 Q Is there any sort of recertification process?</p> <p>15 A You have to become -- you have to apply for</p> <p>16 your license if you wish or -- you have to renew your</p> <p>17 license. That's right. Renew your licence. And that</p> <p>18 happens every two years.</p> <p>19 Q Okay. And what --</p> <p>20 A In connection with that renewal, you have to</p> <p>21 show continuing education requirements and any other</p> <p>22 requirements that the California State Board of</p> <p>23 Accountancy requires.</p> <p>24 Q Okay. Is your license current to date?</p> <p>25 A It is.</p>
<p>Page 15</p> <p>1 I'm guessing this is a four-page document that was</p> <p>2 attached to my report. It is intended to meet the</p> <p>3 biographical requirements of Federal Rules of Civil</p> <p>4 Procedure 26(a)(2).</p> <p>5 It is complete as of the date, at least to</p> <p>6 the best of my knowledge, as of the date it was</p> <p>7 produced. Now, since I can't see the whole thing, my</p> <p>8 assumption could be wrong, but -- but in any event, go</p> <p>9 ahead.</p> <p>10 Q You can open it on your -- on your own</p> <p>11 computer if that would help you answer the question.</p> <p>12 A Well, I -- I can see you're zooming out. It</p> <p>13 does look like the resume that is intended to comply</p> <p>14 with Rule 26 in terms of the expert biographical</p> <p>15 requirements.</p> <p>16 Q Okay.</p> <p>17 A And I understand it to be complete.</p> <p>18 Q Okay. Great. So just to go through this</p> <p>19 quickly.</p> <p>20 You have a BA from Whittier College and</p> <p>21 graduated in 1977, correct?</p> <p>22 A Yes.</p> <p>23 Q What was your major at Whittier?</p> <p>24 A I actually had a double major. I had a major</p> <p>25 of political science and a major in accounting. The</p>	<p>Page 17</p> <p>1 Q You're a certified management accountant</p> <p>2 since 1992?</p> <p>3 A It's so long ago, I'm not sure -- hold on.</p> <p>4 If that's what's in the resume in terms of the year --</p> <p>5 it does say that. Yeah, I'm sure it's right.</p> <p>6 Q Okay. What is a CMA?</p> <p>7 A Certified management accountant is a</p> <p>8 credential issued by the Institute of Management</p> <p>9 Accountants. It is a credential that is intended to</p> <p>10 mirror the requirements of the CPA license that you'd</p> <p>11 asked me about just a moment ago. The difference is</p> <p>12 the subject matter body of knowledge is different.</p> <p>13 For a certified public accountant the focus</p> <p>14 is on auditing taxes, regulatory matters, and</p> <p>15 basically being a public accountant.</p> <p>16 In contrast, the certified management</p> <p>17 accountant has as its focus the skills that would</p> <p>18 typically be required of a chief financial officer in</p> <p>19 a company. So it has internal reporting, internal</p> <p>20 controls, economics, you know, just different subject</p> <p>21 matters or a different emphasis on the subject</p> <p>22 matters.</p> <p>23 But the requirements are -- in terms of</p> <p>24 experience, testing, recertification, things like</p> <p>25 that, are -- are similar. And they're purposefully</p>

<p>1 similar.</p> <p>2 Q You mentioned recertification. Is it similar</p> <p>3 to a CPA where you have to renew your license every</p> <p>4 two years?</p> <p>5 A I suspect they're on a two-year cycle. I</p> <p>6 fill out their paperwork whenever they send it to me.</p> <p>7 But I think it is probably two years.</p> <p>8 Q Okay. And it's current today?</p> <p>9 A It is.</p> <p>10 Q Okay. And you've been an accredited senior</p> <p>11 appraiser since 1995?</p> <p>12 A Correct.</p> <p>13 Q And what is an accredited senior appraiser?</p> <p>14 A That is a difficult-to-get credential in the</p> <p>15 field of business valuation. It is a certificate or</p> <p>16 credential issued by the American Society of</p> <p>17 Appraisers, which itself is a member of the Appraisal</p> <p>18 Institute created by Congress. It is the -- the</p> <p>19 accredited senior member is the higher -- highest</p> <p>20 level of membership in that organization. And as I</p> <p>21 mentioned before, the requirements are probably the</p> <p>22 most difficult in the field of business valuation.</p> <p>23 Q What are the requirements?</p> <p>24 A There's a testing requirement. There's an</p> <p>25 additional oral exam that in my case was conducted by</p>	<p>Page 18</p> <p>1 period of time. And then before that, items that are</p> <p>2 not in my resume were also accounting work. Basically</p> <p>3 I worked my way through school as an accountant.</p> <p>4 Q Okay. And then you started at Anderson in</p> <p>5 1977?</p> <p>6 A I did start at Anderson in 1977 after I</p> <p>7 graduated.</p> <p>8 Q And in your CV it says that you were</p> <p>9 responsible for forensic accounting and damage</p> <p>10 analysis practice.</p> <p>11 Can you just briefly explain to us what your</p> <p>12 job duties were at Anderson?</p> <p>13 A Well, it obviously varied, but generally</p> <p>14 speaking, my -- I would be considered a line partner,</p> <p>15 so my primary work was serving clients, but I also</p> <p>16 served in an advisory function for others who were</p> <p>17 performing that type of work.</p> <p>18 I don't know if that answers your question or</p> <p>19 not.</p> <p>20 Q Yeah, when -- when you say "damage analysis</p> <p>21 practice," are you talking about litigation consulting</p> <p>22 or something different?</p> <p>23 A Litigation -- well, what is commonly thought</p> <p>24 of as litigation consulting would be part of this</p> <p>25 practice that -- that I was working in, yes. So you</p>
<p>Page 19</p> <p>1 a panel of three examiners and went for probably</p> <p>2 around three hours. There's a peer review of multiple</p> <p>3 appraisal reports. There's direct contact of clients</p> <p>4 who have engaged me as an appraiser to make certain</p> <p>5 that the engagement was performed professionally and</p> <p>6 that any real-world transactions that occurred bore a</p> <p>7 relatively close relationship to the appraisal</p> <p>8 conclusions that I expressed.</p> <p>9 There is a five-year full-time experience</p> <p>10 requirement. That experience requirement must be</p> <p>11 logged and verifiable. And they, in fact, do check</p> <p>12 it. There is a test -- a separate test on the Uniform</p> <p>13 Standards of Professional Appraisal Practice as well</p> <p>14 as required courses in both that and the ethics field</p> <p>15 as well as an ethics exam.</p> <p>16 And then there's recertification requirements</p> <p>17 that happen every five years.</p> <p>18 Q Okay. And is your certification current as</p> <p>19 of today?</p> <p>20 A My ASA is current, yes.</p> <p>21 Q You started your professional accounting</p> <p>22 employment with Anderson LLP in 1977, correct?</p> <p>23 A You had multiple things in your question so</p> <p>24 some of them would be not correct. You'll note from</p> <p>25 my resume that I did have work in a CPA firm for a</p>	<p>Page 21</p> <p>1 could call it that, yes.</p> <p>2 Q Okay. Was there a different -- was there a</p> <p>3 different part of what you were doing in damage</p> <p>4 analysis practice or was it all litigation consulting?</p> <p>5 A Well, I -- I -- I had my ASA at the time so I</p> <p>6 was an independent fee appraiser at the time and could</p> <p>7 and did accept assignments in that regard.</p> <p>8 Also, we did take work that had nothing to do</p> <p>9 with litigation. So personnel under my direction were</p> <p>10 doing other types of investigations, you know</p> <p>11 accounting investigations, due diligence, fraud</p> <p>12 audits, other compliance audits. I would consider</p> <p>13 none of those things to be litigation, yet they all</p> <p>14 fell within the purview of how I and the people</p> <p>15 working with me made a living.</p> <p>16 Q Yep, I agree.</p> <p>17 Okay. And then did you testify in court when</p> <p>18 you worked at Anderson?</p> <p>19 A Yes, quite -- regularly, in fact.</p> <p>20 Q Okay. Approximately how many times?</p> <p>21 A I didn't keep track. You're focusing on</p> <p>22 in-court testimonies?</p> <p>23 Q Yes.</p> <p>24 A And -- and only at Anderson?</p> <p>25 Q Correct.</p>

<p>1 A Well, I don't have a good count. If someone 2 told me it was 200 times, that would not surprise me, 3 but I don't have a count.</p> <p>4 Q Okay. What types of clients did you have at 5 Anderson?</p> <p>6 A We would work for both plaintiffs and 7 defendants. Most of our clients were corporations or 8 very well-heeled individuals.</p> <p>9 Q Okay. You founded Fulcrum Financial Inquiry 10 in -- I'm sorry. You founded -- hold on.</p> <p>11 Did you work on -- with IP types of cases 12 when you were at Anderson?</p> <p>13 A Yes.</p> <p>14 Q What percentage of your client load was IP 15 clients?</p> <p>16 A I -- I don't have a percentage in mind. I 17 can tell you that I -- IP work, and there's different 18 types of IP work, but IP work generally was probably 19 my largest single area and that probably continues to 20 be the case now.</p> <p>21 Q Did you have nonprofit clients when you were 22 at Anderson?</p> <p>23 A I did.</p> <p>24 Q Okay. Can you give us an estimation of how 25 many?</p>	<p>Page 22</p> <p>1 the assignment, it was an investigation. And then 2 after that the relationship I would say morphed into a 3 recurring audit. And so I was -- I basically led -- 4 or -- or served on that engagement team and as I got 5 more experience, ended up leading that project for 6 that client. It was a very long-term client. So 7 ultimately we were doing audit tax services but it 8 started out as an investigation.</p> <p>9 Q Got it.</p> <p>10 And you were retained by the board of that 11 nonprofit to do an investigation I'm assuming into 12 some area that they were curious about or looking into 13 or was it something else?</p> <p>14 A Correct.</p> <p>15 Q Okay.</p> <p>16 A Correct.</p> <p>17 Q Did you -- once it morphed into something 18 more, were you providing services such as working on 19 their annual reports?</p> <p>20 A Yes, they -- they -- we -- we -- the 21 deliverable for my firm was annual financial 22 statements of -- there were actually four audited 23 financial statements dealing with different entities 24 which were generally made public. And then we were 25 also responsible as the tax return preparer for all of</p>
<p>Page 23</p> <p>1 A Not a good one. I had as -- as one of my 2 clients, a long-term client, a -- probably the largest 3 nonprofit client in the firm in terms of -- of fees 4 generated.</p> <p>5 Now, just because that happened, I got 6 referred to quite a bit on nonprofits so if someone 7 had an issue on nonprofits, someone might say, oh, 8 call Nolte, he's probably run across this because he's 9 been serving this very large client for -- well, I 10 think I ended up serving him probably 15 years. So 11 I -- I ended up serving as a second partner and 12 advisory partner on a number of nonprofits.</p> <p>13 I also served as an engagement partner for 14 others, but that was mainly -- that -- that was not as 15 common as me being called and -- and just asked to -- 16 to read something or give advice in terms of what was 17 the accounting rules or something like that.</p> <p>18 Q Okay.</p> <p>19 A So I -- I don't know how you count those 20 clients, in other words. But I -- I was having to 21 deal with those types of inquiries fairly regularly.</p> <p>22 Q Well, that's what I was going to ask you next 23 is, for this large client that you're referring to, 24 what kind of work were you doing for them?</p> <p>25 A Initially, which is the reason I was put on</p>	<p>Page 25</p> <p>1 their entities.</p> <p>2 Q Okay. So 990s?</p> <p>3 A 990s and the affiliated returns, yes.</p> <p>4 Q Okay. You mentioned four audited financial 5 statements. What were those? Are you talking about 6 quarterly financial statements or something different?</p> <p>7 A Well, they were annual statements so they 8 were once-a-year financial statements.</p> <p>9 Q Okay. Other than the financial statements 10 and the 990s, what else were you preparing for them?</p> <p>11 A Well, we would do whatever other consulting 12 arose based on their needs. So if they needed 13 assistance that -- involving whatever that came up, we 14 of course would be able to help them and as you would 15 for any full service audit tax client.</p> <p>16 Q Have you ever served on the board of a 17 nonprofit?</p> <p>18 A Yes.</p> <p>19 Q When?</p> <p>20 A Oh, it was probably for around 25 years. It 21 ended maybe, I don't know, around maybe two years ago. 22 So whatever current date minus 25 -- minus two years 23 minus 25 years, whatever that amounts to. But I was 24 on the board, I believe, for about 25 years.</p> <p>25 Q Okay. What nonprofit?</p>

<p>1 A Public Counsel. In case you're -- you might 2 be familiar with them because they are locally based. 3 But they're the largest pro bono legal organization in 4 the United States, maybe the world. 5 Q Did you provide any accounting services to 6 Public Counsel? 7 A All of the accounting services I provided 8 were on a pro bono basis. I provided regular -- 9 regular accounting services to them, both as a board 10 member, a committee member, a committee chairman and 11 as someone who was assisting in Public Counsel's 12 client work. So I -- all of my pro bono efforts were 13 done through Public Counsel, and there was a fair 14 amount of that effort. 15 Q Okay. Any other nonprofits where you served 16 on the board? 17 A Well, I don't -- I don't know if you count 18 professional organizations. They are nonprofits as 19 well. But I -- I would view them as somewhat 20 different. But, yes, I have served on boards of -- of 21 professional organizations which are nonprofit 22 organizations. 23 Q I'm assuming accounting-related professional 24 organizations? 25 A That would be correct.</p>	<p>Page 26</p> <p>1 my -- my answer to preparing tax filings. We do not 2 prepare compliance tax returns. We would refer that 3 work out. I -- I -- we could. We have a license to 4 do so. We are a -- a licensed CPA firm. But we 5 choose not to do compliance tax work. 6 Q Okay. And do you do any of the business 7 valuation work currently that you were talking about 8 when we were discussing the ASA credential? 9 A I lead the business valuation practice at 10 Fulcrum. I would say that I probably personally am 11 signing, if not a hundred percent, close to a hundred 12 percent of the appraisal reports that go out the door. 13 Q What percentage of Fulcrum's work is 14 appraisal work? 15 A I don't know. We don't keep track. 16 Q Okay. Do you have a current caseload now of 17 appraisal work? 18 A Yes. 19 Q Okay. Of the matters that you're handling 20 now, how many are litigation-related and how many are 21 appraisal? 22 MR. THOMAS: Object to the form. 23 THE WITNESS: Well, I haven't gone and kept 24 track. I do know at least one assignment right now 25 that -- that's active that has nothing to do with</p>
<p>Page 27</p> <p>1 Q Okay. So next you founded Fulcrum Financial 2 Inquiry in 2002; is that correct? 3 A Correct. 4 Q Approximately how many people does Fulcrum 5 employ? 6 A We're down considerably at this point. 7 There's probably around, I don't know, a half dozen, 8 maybe a few more, people at this point. 9 Q Are the six people all accountants or are you 10 including staff? 11 A No, I'm -- I'm looking at professional people 12 that are, if not accountants, they're economists or 13 appraisers or number -- they're numbers-type guys. 14 Q Okay. Got it. I was going to say numbers 15 people, but I didn't want you to be offended, so I'm 16 glad you said it first. 17 A No, that's fine. 18 Q Okay. Good. 19 What percentage of Fulcrum's business is 20 litigation consulting? 21 A We don't keep track so I don't know. 22 Q Okay. Do you take -- do you accept clients 23 for CPA-type work, preparing filings, IRS filings, 24 reports? 25 A Okay. I'm -- I'm going to limit your --</p>	<p>Page 29</p> <p>1 litigation. The non-litigation assignments tend to be 2 kind of -- they don't last very long. They're just a 3 couple-week assignments. So in terms of, you know, a 4 backlog of work, those -- plain appraisal reports get 5 worked through the system fairly quickly. 6 The litigation -- items in which there's a 7 dispute tend to drag on for years. But I -- at 8 least -- I got at least one assignment where I'm 9 currently doing an appraisal that has nothing to do 10 with litigation. 11 BY MS. McCONNELL: 12 Q How many litigation matters are you handling 13 currently? 14 A I -- I don't understand your -- I don't 15 understand your question. I could give you different 16 answers depending on what you meant by that. 17 Q Okay. I'm assuming the word "handling" is 18 what threw you off. 19 So how many litigation matters are you 20 currently working on? 21 A Well, I'm -- I'm not trying to be obstinate, 22 but if I give you a number there's going to be some 23 assumptions that are not explicit in your question. 24 When you say "currently," I mean, you know, 25 in any two-week period I might have, I don't know, six</p>

<p style="text-align: right;">Page 30</p> <p>1 different matters, half dozen matters that I might    2 work on in a two-week period. Some of them might be    3 appraisal, some might not. Next two-week period,    4 because that's when we do time reports, you'd have a    5 different six matters.</p> <p>6 But I don't know if that's answering your    7 question or not.</p> <p>8 Q I understand. That's fine.</p> <p>9 You could be retained on a case or designated    10 on a case but not perform any work on that case in a    11 two-week period; is that true?</p> <p>12 A Correct. I've got matters that are open    13 where we haven't done anything in months.</p> <p>14 Q Right. Right. Okay. I get it.</p> <p>15 And I don't know that you have the answer to    16 this question, but I'll ask you anyway.</p> <p>17 Since founding Fulcrum approximately how many    18 times have you provided expert testimony?</p> <p>19 A That's 19 years. I couldn't tell you but I'm    20 sure its hundreds, plural, but I don't have a number.</p> <p>21 Q Okay. You submitted with your expert report    22 a list of 31 cases where you provided trial and    23 deposition testimony in the last four years.</p> <p>24 Is that still an accurate number, 31, or has    25 that changed?</p>	<p style="text-align: right;">Page 32</p> <p>1 It does not change my understanding of what    2 the breakdown between plaintiff and defendant work is.    3 I would suggest it's 50/50. I suspect if -- if what    4 you're -- I'm just accepting your compilation, which I    5 have not done and never heard anybody else do it. It    6 wouldn't surprise me if -- if the items that are    7 listed might have more defense work because, candidly,    8 the defense cases tend to be larger and -- and    9 sometimes more interesting. And the items that I    10 select on that resume, you know, try to be the more    11 interesting ones.</p> <p>12 So that might be an explanation. But again,    13 I've never really thought of it -- I've never done    14 what you've done, and it doesn't -- does not change my    15 perception that it's 50/50.</p> <p>16 Q Okay. I hope this case becomes interesting    17 enough to make it to your list one day, Mr. Nolte, but    18 put that aside.</p> <p>19 So other than this case, how many times have    20 you been retained by Jenner &amp; Block to provide an    21 expert opinion?</p> <p>22 A I just -- I have to comment. I just -- you    23 know, I probably won't put it on my resume because    24 that -- this is another defendant's case and, golly, I    25 wouldn't want to be able to have another defendant</p>
<p style="text-align: right;">Page 31</p> <p>1 A Well, the list is current as of whatever    2 moment the report's issued. It's going to change    3 almost all the time so it -- it -- if I issued -- if I    4 issued such a listing today, that list would be    5 different. Some would drop off and some would be    6 added.</p> <p>7 Q And are you able to tell us the percentage    8 breakdown of cases where you testified for a    9 plaintiff's side versus defendant's side?</p> <p>10 A My understanding is it's about 50/50. And    11 that's been the case since I started this work decades    12 ago. I -- I don't keep track, though.</p> <p>13 Q Okay. On your website you have a longer    14 version of your resume and you have a list of    15 representative testimony experience and that list    16 contains 222 cases. Of those 222 cases, 81 times you    17 listed plaintiff, that you were a plaintiff expert,    18 and 141 times you were listed as a defendant expert.    19 That breakdown is about 36 percent plaintiff and    20 63 percent defendant.</p> <p>21 Does that breakdown sound right to you or is    22 that not accurate?</p> <p>23 A Well, I've never done the math that you've    24 just done, nor has anyone else, so this is the first    25 time I've ever heard this statistic.</p>	<p style="text-align: right;">Page 33</p> <p>1 matter. I'll have to add some plaintiff work on that.    2 I'm sorry. You want to know about Jenner &amp;    3 Block.</p> <p>4 I've worked with Jenner &amp; Block regularly.    5 They're a large firm and so I've worked with them    6 before. I -- I suspect that if you went through the    7 listing in the last four years you probably would find    8 a Jenner &amp; Block listing or so. And -- and you might    9 find the same thing on my other resume as well. That    10 wouldn't surprise me.</p> <p>11 Q Okay. Have you ever worked specifically with    12 Mr. Thomas or Mr. Sullivan before?</p> <p>13 A Not for Mr. Thomas. Mr. Sullivan, just    14 coincidentally, had another matter where it's    15 currently active where he's involved as well, so I --    16 I think the other matter started first, but I could be    17 wrong. But in any event, I -- Mr. Sullivan and I    18 worked on more than one matter together.</p> <p>19 Q Okay. Is that either the Big 12 Conference    20 case or the Knickerbocker Films case?</p> <p>21 A No.</p> <p>22 Q Okay. Is that a litigated matter in the    23 Central District?</p> <p>24 A No.</p> <p>25 Q Okay. Do you know where that case is?</p>

<p>1 A Yes, I do.</p> <p>2 Q Where?</p> <p>3 A It's in Nevada.</p> <p>4 Q Okay. And are you -- what kind of -- well, 5 strike that. We'll get to it later.</p> <p>6 Okay. Have you ever done any -- any work for 7 SAG-AFTRA?</p> <p>8 A Other than this assignment, nothing comes to 9 mind.</p> <p>10 Q Okay. And have you ever done any work for 11 AFM?</p> <p>12 A Other than this assignment, nothing comes to 13 mind.</p> <p>14 Q Okay. And then, other than this assignment, 15 have you done any work for the Fund?</p> <p>16 A No.</p> <p>17 Q Okay. And have you ever worked with the law 18 firm of Bredhoff &amp; Kaiser?</p> <p>19 A Not to my recollection.</p> <p>20 Q What percentage of Fulcrum's work involves 21 the valuation of patents?</p> <p>22 A Oh, I don't keep track. I -- I don't have an 23 idea of that.</p> <p>24 Q Okay. You mentioned earlier that a 25 significant amount of Fulcrum's work is in the area of</p>	<p>Page 34</p> <p>1 Counsel.</p> <p>2 Q Okay.</p> <p>3 A I'll say originated from Public Counsel.</p> <p>4 Q And when you were doing that work that 5 originated from Public Counsel, were you performing 6 tax-related services or something different?</p> <p>7 A Generally -- yeah, there's multiple ways I 8 can answer that question, which is why I'm pausing.</p> <p>9 I have not signed any tax returns as a paid 10 tax preparer in that. So that's a very technical and 11 narrow answer. But I -- I did not sign any tax 12 returns as a paid preparer. I was not required to do 13 so based on the work I was doing.</p> <p>14 Q What was the work that you were doing?</p> <p>15 A Well, it would vary. It -- for the --</p> <p>16 general -- putting aside work for Public Counsel 17 itself, which -- I mean, just put that aside, because 18 I was involved in Public Counsel's tax return.</p> <p>19 But nevertheless, generally we were setting 20 up accounting systems and advising a nonprofit in 21 terms of the -- I'll call it the business or office 22 portion of -- of their -- of their operation.</p> <p>23 I mean, maybe just in case, I'm not trying to 24 be oblique, the typical situation was, you had some 25 person who wanted to do good to some group of people</p>
<p>1 IP; is that correct?</p> <p>2 A Well, whether it's significant or not, I did 3 indicate that intellectual property work in one form 4 or another is probably the single largest area. I 5 don't know whether that makes it significant or not. 6 But I -- I have for decades done intellectual property 7 work.</p> <p>8 Q Would you be able to tell us how many patent 9 cases you've testified in?</p> <p>10 A No. I mean, it's been quite a few, but -- 11 but, no, I don't have a number in mind.</p> <p>12 Q Okay. While at Fulcrum have you had any 13 nonprofit clients?</p> <p>14 A You know, I have to imagine we have, but I -- 15 none are coming to mind. Now, I'm excluding from that 16 answer the pro bono work that I've described, which 17 has been a number of assignments, and I view those 18 companies or folks as -- as -- as clients.</p> <p>19 Q You're talking about the Public Counsel work?</p> <p>20 A It was generally done through Public Counsel, 21 yes.</p> <p>22 Q Okay.</p> <p>23 A But in -- in some cases they -- the Public 24 Counsel would refer a matter out, I would service that 25 nonprofit and -- and -- but the work came from Public</p>	<p>Page 35</p> <p>1 that needed help, and they were -- they -- they had 2 their hearts in the right spot and they were very 3 skilled in the areas necessary to provide that 4 assistance, but they were not business people, did not 5 want to be business people and were generally dreadful 6 at anything involving accounting or business or law or 7 anything else involving running the operation of 8 their -- of their nonprofit.</p> <p>9 So they'd be a disaster in terms of keeping 10 the business and money aspect of their nonprofit 11 together. And so we would help them set that up with 12 the goal of ultimately making them self-sufficient.</p> <p>13 That sometimes involved helping them hire someone, and 14 we might, in fact, you know, do interviews or help 15 them become self-sufficient. Whatever that took.</p> <p>16 Q Got it. Okay.</p> <p>17 When were you first retained by Jenner &amp; 18 Block to perform work in this case?</p> <p>19 A You have my engagement letter. Whatever date 20 is on that engagement letter would be the best date 21 that I could give you. And, in fact, I -- to best 22 answer your question, I'd actually go to the 23 engagement letter and look it up.</p> <p>24 But if you want something much more 25 approximate, it would be, you know, sometime a little</p>

<p>1 bit less than a year ago.</p> <p>2 Q Okay.</p> <p>3 A But again, I'd -- I'd encourage you to look</p> <p>4 at the engagement letter.</p> <p>5 Q The engagement letter is dated June 12, 2020,</p> <p>6 and it's signed July 7, 2020.</p> <p>7 Does that sound approximately correct?</p> <p>8 A Sure. That -- that's generally consistent</p> <p>9 with what I was thinking. I said a year ago but a</p> <p>10 little bit less than a year ago and that -- that's in</p> <p>11 the ballpark.</p> <p>12 Q Nailed it. Okay.</p> <p>13 According to the listing of trial and</p> <p>14 deposition testimonies in the last four years that was</p> <p>15 submitted with your report, you have two Jenner &amp;</p> <p>16 Block cases on there, which I mentioned earlier, it</p> <p>17 was the Big 12 Conference case and the Knickerbocker</p> <p>18 Films case.</p> <p>19 Were those both intellectual property cases?</p> <p>20 A The Big 12 case I would describe as a</p> <p>21 valuation matter. We were valuing television rights,</p> <p>22 so what we were valuing was intellectual property. I</p> <p>23 mean, there -- there was nothing physical about --</p> <p>24 about what we were valuing. We were valuing broadcast</p> <p>25 rights.</p>	<p>Page 38</p> <p>1 BY MS. McCONNELL:</p> <p>2 Q And again, you're free to open them up on</p> <p>3 your own in the chat, and then we'll share the screen</p> <p>4 as well.</p> <p>5 A Okay. How can I help you?</p> <p>6 Q I don't know. Give me a second.</p> <p>7 Okay. So on page 2 of this first invoice</p> <p>8 that's dated October 30th, 2020, you are billing for</p> <p>9 4.4 hours of work.</p> <p>10 If you recall, is this the first -- strike</p> <p>11 that.</p> <p>12 If you recall, is this the initial time that</p> <p>13 you spent on this case, was in October of 2020 or</p> <p>14 September and October of 2020?</p> <p>15 A I endeavor to number each of my bills in the</p> <p>16 transmittal. So I think if you go to the page before</p> <p>17 that it will say whether it's the first, second,</p> <p>18 whatever bill. It does say here first billing. So</p> <p>19 this is the first bill and -- so if it isn't the first</p> <p>20 time I incurred, it was certainly the first time I</p> <p>21 billed.</p> <p>22 Q Okay. You have here under number 1 some</p> <p>23 documents that you reviewed, the complaint, the motion</p> <p>24 to dismiss and related papers, the opposition to class</p> <p>25 certification, response to first set of</p>
<p>Page 39</p> <p>1 The Knickerbocker case was a participation</p> <p>2 accounting matter, so that was -- it -- I would view</p> <p>3 it more as than an accounting issue. Now -- now, that</p> <p>4 case ultimately is -- is a vertical integration</p> <p>5 matter, and so one of the issues involves the pricing</p> <p>6 of transactions along the vertical channel of</p> <p>7 distribution. So in that sense it could be considered</p> <p>8 an intellectual property case, but that's not -- the</p> <p>9 underlying formulation of the dispute was a</p> <p>10 participation interest.</p> <p>11 Q Okay. In the Big 12 Conference case were you</p> <p>12 retained on behalf of the Big 12 Conference or Fox</p> <p>13 Broadcasting?</p> <p>14 A Fox Broadcasting was my client.</p> <p>15 Q Okay. And then how about in the</p> <p>16 Knickerbocker Films case?</p> <p>17 A Fox was my client there. I don't remember</p> <p>18 which entity of Fox. But ultimately, if you follow</p> <p>19 the breadcrumbs up to the parent, it was a Fox entity.</p> <p>20 Q Okay. I have it as 21st Century Fox.</p> <p>21 A Okay.</p> <p>22 Q Okay.</p> <p>23 MS. McCONNELL: Okay. Let's go to Exhibit 2,</p> <p>24 Nico, if you could send him his invoices, please.</p> <p>25 (Exhibit 2 marked.)</p>	<p>Page 40</p> <p>1 interrogatories.</p> <p>2 Do you typically insert a complete list of</p> <p>3 everything that you've reviewed into your invoice or</p> <p>4 are there sometimes documents that you've reviewed</p> <p>5 that don't make their way into the invoice?</p> <p>6 A Well, I'm not purposefully leaving anything</p> <p>7 out unless it was simply not important. But I would</p> <p>8 not represent that those are the only things I -- I</p> <p>9 received. I don't know if that's helpful or not. But</p> <p>10 I'm -- I'm trying to describe the work but I don't</p> <p>11 want to -- I'm not being tedious about it either.</p> <p>12 Q Okay. So there might be some materials that</p> <p>13 you reviewed that don't make their way to invoice?</p> <p>14 A Sure. Particularly if they weren't</p> <p>15 particularly important for whatever was occurring in</p> <p>16 the matter at that time.</p> <p>17 Q Okay. If you look at number 3, it says,</p> <p>18 "Initial review of the cost information accumulated by</p> <p>19 the Fund pertaining to the Fund's research function."</p> <p>20 Do you recall what documents or materials you</p> <p>21 reviewed?</p> <p>22 A Well, the -- the best answer is no, I don't.</p> <p>23 But your admonitions also said, well, golly, I have a</p> <p>24 right to whatever you can maybe think of without --</p> <p>25 that isn't guessing and I'm -- I'm on the border of</p>

<p>1 guessing right now.</p> <p>2 I know there is cost information that was</p> <p>3 produced in this matter. It was given -- the results</p> <p>4 of that were given to you by Ms. Taub in one of her</p> <p>5 depositions. And I was aware of that information at</p> <p>6 the time it was being accumulated, so I highly</p> <p>7 suspect, although I really don't recall, that that's</p> <p>8 what this is referring to.</p> <p>9 Q Okay. I'm trying to find your words of how</p> <p>10 you characterized it. But it was the information to</p> <p>11 the Fund to perform their research function; is that</p> <p>12 correct?</p> <p>13 MR. THOMAS: Object to form.</p> <p>14 THE WITNESS: I do mention that in -- I think</p> <p>15 it's mentioned in my report, yeah.</p> <p>16 BY MS. McCONNELL:</p> <p>17 Q Yes, I think your -- your heading for that</p> <p>18 section is, "The Fund's cost of maintaining the</p> <p>19 participant database."</p> <p>20 A Okay.</p> <p>21 Q You mentioned you were aware that Ms. Taub</p> <p>22 was collecting this information. Did you give her any</p> <p>23 input on -- on where to find this information or how</p> <p>24 to calculate this information?</p> <p>25 A I don't recall anything like that. If -- if</p>	<p>1 copy of it.</p> <p>2 Q Okay. On task 3 you have, "Research from</p> <p>3 public sources regarding the companies that sell</p> <p>4 information as their primary business."</p> <p>5 How did you choose the companies that you</p> <p>6 ended up researching?</p> <p>7 A This made its way into my report as one of</p> <p>8 the first numbered or lettered conclusions. I was</p> <p>9 looking for examples of well-known companies that sell</p> <p>10 information as their -- if not primary, it's certainly</p> <p>11 their largest business and -- in -- in order to</p> <p>12 demonstrate what I believe was demonstrated in the</p> <p>13 report in that lettered conclusion A, as in apple.</p> <p>14 So I mean, what was I doing, I was looking</p> <p>15 for information companies that -- that were well-known</p> <p>16 and -- and were highly valuable. And at some point I</p> <p>17 stopped because I didn't want to beat a dead horse</p> <p>18 with something which I thought should be self-evident</p> <p>19 by the time you read the examples that I gave. I</p> <p>20 could have come up with others, but I stopped when I</p> <p>21 was worried about overdoing a point.</p> <p>22 Q Why did you -- why did you choose companies</p> <p>23 that sell information as their primary or largest</p> <p>24 business as opposed to companies that sell information</p> <p>25 as their ancillary business?</p>
<p>1 they did have questions of me, I certainly would have</p> <p>2 answered them but I don't have any recollection of</p> <p>3 that.</p> <p>4 Q Okay. Your second invoice has the date</p> <p>5 December 31, and this is for work performed in --</p> <p>6 when? I think November and December of 2020. Yeah.</p> <p>7 Perfect.</p> <p>8 MS. McCONNELL: And, Nico, if you want to go</p> <p>9 to the next page.</p> <p>10 Q So again, you have three documents here that</p> <p>11 you read or scanned. But again, you could have</p> <p>12 received other ones that were not important to your</p> <p>13 analysis that aren't included here, right?</p> <p>14 A You said important to my analysis?</p> <p>15 Q Yeah, I thought that was your word, but I</p> <p>16 could have --</p> <p>17 A No, I -- I'm sorry if -- I -- what I had in</p> <p>18 mind was unimportant to the analyses. So in other</p> <p>19 words, if there's something that's central to my</p> <p>20 analysis, I'm not telling you I'm perfect, but my</p> <p>21 intention would be to list it.</p> <p>22 If I had something that was received but it</p> <p>23 really didn't matter and consequently, I didn't spend</p> <p>24 much time on it, then I probably would not list it</p> <p>25 even though I had physically got -- you know, seen a</p>	<p>1 A Something in the transmission was -- was --</p> <p>2 did not come across clear so someone will need to</p> <p>3 repeat the question, unfortunately.</p> <p>4 Q I can do it.</p> <p>5 Why did you choose companies that sell</p> <p>6 information as their primary or largest business as</p> <p>7 opposed to companies that sell information as their</p> <p>8 ancillary business?</p> <p>9 A What I was looking for was information</p> <p>10 about -- that -- that was disclosed publicly. So</p> <p>11 if -- if it's an ancillary business, then the public</p> <p>12 disclosures are going to be minimal, short, brief,</p> <p>13 maybe nonexistent. And so I -- I needed to have</p> <p>14 companies that had as the primary business in order to</p> <p>15 demonstrate what value was being generated by the</p> <p>16 information.</p> <p>17 So, for example -- I'll just give you an</p> <p>18 example. Let's say we went to General Motors.</p> <p>19 General Motors has a licensing program and -- but it's</p> <p>20 not their primary business. General Motors in their</p> <p>21 public disclosures might have a paragraph or two about</p> <p>22 their licensing, but it's not going to -- it's not</p> <p>23 going to allow you to say that the General Motors</p> <p>24 licensing is worth X billions of dollars because their</p> <p>25 primary operation is not licensing.</p>

1 You could even go to a company as big as,  
 2 let's say, Disney. I've done quite a bit of work for  
 3 Disney, including their licensing. Disney has a  
 4 substantial business in licensing, but it is not their  
 5 primary business. And so I could not say with Disney  
 6 that the substantial market capitalization of -- of  
 7 Disney is because of their intellectual property  
 8 involving their characters.

9 (Even though no one would dispute that the  
 10 Lion King and, you know, Mickey Mouse and all of those  
 11 have -- have huge value, but Disney's also got a huge  
 12 film library, a huge studio. They've got everything  
 13 that makes up Disney. I mean, you know, the theme  
 14 parks, everything else. And as a result you just  
 15 can't reach any conclusions about the value of  
 16 Disney's intellectual property even though Disney's  
 17 got substantial amounts of intellectual property.)

18 (I'll give you another example. Nike. I  
 19 mean, I've done a substantial amount of work for Nike  
 20 in -- in their licensing area. The swoosh is very  
 21 valuable to Nike. And they get a lot of money from  
 22 that swoosh. But you can't say how much of the  
 23 substantial market capitalization of Nike is due to  
 24 the swoosh versus all the stuff they sell.)

25 (So in order to avoid that problem, I had to

1 And -- and it's legally a license for a  
 2 specific limited use versus sale. Because if it was a  
 3 sale and then someone should resell it, then of course  
 4 you'd lose the value of the intellectual property.)

5 (Now -- now, a common person might say, I  
 6 bought this list, but they really didn't buy the list,  
 7 they legally licensed it for a specific purpose.)

8 (Q) Are you aware of any nonprofits that charge  
 9 for data?)

10 (MR. THOMAS: Objection; vague.)

11 (THE WITNESS: Nonprofits will sell mailing  
 12 lists, and I have seen that done, so I guess in that  
 13 sense the answer would be, yes. It's -- it's a  
 14 sensitive area. But I have seen nonprofits sell or  
 15 license mailing lists.)

16 (BY MS. McCONNELL:)

17 (Q) Were these nonprofits clients of yours?  
 18 (A) Yes.)

19 (Q) Okay. And why do you say it was a sensitive  
 20 area?)

21 (A) Well, unlike the situation that we have here  
 22 in this matter where the providing of the names pretty  
 23 directly would benefit the people who are -- the Fund  
 24 is trying to send money to, that is not uniformly the  
 25 case in the sale of -- or -- or licensing of a mailing

1 (do what I did so that I could equate the information  
 2 to the market cap, which was one of the points that I  
 3 was trying to make.)

4 (Q) Were you able to find any nonprofit  
 5 businesses who were in the business of selling data?  
 6 (A) A nonprofit would never be in the business of  
 7 selling data. That does not mean that they cannot  
 8 and, in fact, might not be required to charge for  
 9 items of value that -- that they're delivering to  
 10 others. But no, I -- I would not expect to see a  
 11 nonprofit whose primary business was the sale of  
 12 information.)

13 (Q) And you mentioned licensing a few times.  
 14 (Were you -- were you focused on locating  
 15 companies that license information as opposed to the  
 16 sale of information or did that distinction not matter  
 17 to you for this exercise?)

18 (A) As a legal matter, almost all -- I'll call it  
 19 sales, I'm being a bit imprecise there, but almost all  
 20 sales of information actually take the form of  
 21 licenses. So in other words, the agreements are  
 22 almost across the board. Says we're going to let you  
 23 use this piece of information for this specific  
 24 purpose both in terms of, you know, number of uses,  
 25 times of uses, et cetera.)

1 (list.)

2 (You know, in a -- in a less, you know,  
 3 charitable or -- or kind way, you could think of that  
 4 as junk mail, and people when they think of junk mail  
 5 they don't -- they're not terribly happy about getting  
 6 more junk mail. And if -- if they thought that a  
 7 charity was selling or licensing their information so  
 8 they'd get more junk mail, that -- that may not be  
 9 something that a charity wants to highlight.)

10 (Q) How did these charities that you worked with  
 11 report the sale or license of the mailing lists on  
 12 their tax forms?)

13 (A) It depends on which tax form. But generally  
 14 the -- the mailing list licensing would be unrelated  
 15 business income.)

16 (Q) Okay. So on the 990 it would be listed under  
 17 unrelated business income?)

18 (A) Well, I think it's actually a separate form,  
 19 but -- but, yes. But in -- in most cases I -- I think  
 20 what I just described would be unrelated business  
 21 income.)

22 (Q) Okay. And that's because the charity's  
 23 primary purpose isn't the sale or license of data,  
 24 it's just something that they're doing on the side?)

25 (A) That would be not a very good explanation of

1 it. I mean, I can appreciate why you'd say that, but  
2 that would not be -- the -- the issue of unrelated  
3 business income is one of -- of parody with for-profit  
4 organizations.

5 So if, for example, there's a for-profit  
6 organization that has to fully pay taxes and it is  
7 selling mailing lists and a charity says, we got some  
8 pretty great mailing lists, how -- you know, buy our  
9 list instead, we can charge you less money because  
10 after all we don't pay taxes. That is exactly what  
11 the tax rules are trying to avoid.

12 So it is not just what you said. It -- the  
13 underlying intent is to make the charities on an even  
14 basis with the nonprofits -- or with -- with the --  
15 with the for-profit enterprises.

16 Q When -- when a charity lists something as  
17 unrelated business income, does that mean that they  
18 get taxed on that income?

19 A Yes.

20 Q Okay.

21 A Well, yeah -- yes, it's -- it's a little bit  
22 different than that, but -- but we'll just call it  
23 yes. I mean, you have to go through a tax  
24 calculation. It might be that there's not much tax  
25 actually paid but -- but as a starting point it

1 managed or monitored is that the person who controls  
2 the list actually does the mailing. So in other  
3 words, you -- you provide a mailing service -- you, I  
4 say -- I mean the person selling the mailing list does  
5 not actually give the list away. They say, you know,  
6 we're going to send out X parcels, it will be to this  
7 demographic, you give us the pieces you want mailed  
8 and we'll charge you for the postage and -- and we'll  
9 mail it. And so they keep control of the list to make  
10 sure it continues to have -- retain its value.

11 Q I see.

12 Have you seen a situation where the nonprofit  
13 organization would give away the mailing list to the  
14 party it was contracting with and then say, at the  
15 conclusion of this license, return the information to  
16 us?

17 A Assuming I understand your hypo -- no, I've  
18 not seen that. Charities don't -- should -- should  
19 not be giving things away. If they were giving things  
20 away of value, I would tell them to stop it. And --  
21 and I don't recall ever seeing that, though.

22 Q Okay.

23 MS. McCONNELL: Did you guy want to take a  
24 quick break or do you want to keep going? We've been  
25 going for about --

1 becomes subject to possible taxation.

2 Q Better way of saying it, yes.

3 Okay. Have you reviewed any contracts for  
4 the sale of mailing lists for these charity clients of  
5 yours?

6 A I don't recall.

7 Q Okay. Are you familiar with licensing  
8 agreements in general?

9 A Yes.

10 Q Okay. Do licensing agreements say anything  
11 typically about returning or destroying the lists upon  
12 the license's expiration?

13 MR. THOMAS: Objection; vague and overbroad.

14 THE WITNESS: Well, you're not asking about  
15 this situation, you're asking about some situation in  
16 which there's a license for a one-time use; is that --  
17 is that fair?

18 BY MS. McCONNELL:

19 Q I'm -- I'm talking about licensing agreements  
20 in general. I'm not talking about the services  
21 agreement in this case.

22 A I don't know that I can answer that question.  
23 If -- if the -- if the payment is -- is for one use,  
24 then you get one use.

25 Frequently the way that's -- that's actually

1 MR. THOMAS: Probably a good time.

2 MS. McCONNELL: Okay. We'll take maybe  
3 five minutes and come back.

4 MR. THOMAS: Sure.

5 THE VIDEOGRAPHER: We are now going off the  
6 record, and the time is 10:13 a.m.

7 (Recess.)

8 THE VIDEOGRAPHER: We are now going back on  
9 the record, and the time is 10:25 a.m.

10 BY MS. McCONNELL:

11 Q Mr. Nolte, did the nonprofit status of  
12 SAG-AFTRA, AFM or the Fund impact your analysis in  
13 this case?

14 MR. THOMAS: Objection; overbroad, vague.

15 THE WITNESS: Could you read the question,  
16 please?

17 MS. McCONNELL: Shari, do you mind.  
18 (Record read.)

19 THE WITNESS: In order to answer that  
20 question, I have to put myself in a situation of  
21 saying it was a different entity that was other than  
22 this particular fund and would that alter the  
23 conclusion. And -- and I suspect it would not but  
24 I -- but the point is I haven't really done that.

25 So I -- I was aware of the -- of -- of who

<p>1 these particular entities were from the very beginning      2 of the assignment. And so in some respects you're      3 asking me to speculate in terms of reinventing the      4 entire assignment with a different set of entities.      5 And I -- I don't know that I'm comfortable agreeing      6 with that.</p> <p>7 BY MS. McCONNELL:</p> <p>8 Q I think what you're saying is, you're talking      9 about the relationship between the AFM, SAG-AFTRA and      10 the Fund as opposed to -- I think my question was      11 just, does the fact that AFM and SAG-AFTRA have      12 nonprofit status affect your opinion?</p> <p>13 MR. THOMAS: Same objections.</p> <p>14 THE WITNESS: And I'd have to give you the      15 same answer. I was aware of the relationship between      16 the parties, and I was aware of their tax status. I      17 wasn't trying to do a second assignment in terms of      18 what the difference would be if they were a for-profit      19 enterprise.</p> <p>20 Nothing comes to mind in terms of      21 differences, but that does not mean that differences      22 don't exist that would be clear to me if I actually      23 rethought about the entire assignment. But since I've      24 not rethought the entire assignment, I don't think I      25 can give a complete answer to your question.</p>	<p>Page 54</p> <p>1 BY MS. McCONNELL:      2 Q Okay. And what are --      3 THE WITNESS: Okay. Hold on. Hold on. I      4 should -- I -- I apologize to Mr. Thomas. I should      5 have waited and been slower.      6 But the answer is yes, I did consider that.</p> <p>7 BY MS. McCONNELL:</p> <p>8 Q Okay. <b>How did that factor into your analysis?</b>      9 A Well, I am aware that each of the parties      10 that are defendants in this matter have multiple      11 persons for which they owe a responsibility, which      12 you've told me to assume is a fiduciary duty versus      13 some other type of duty that might be slightly      14 different legally.      15 With respect to the unions in particular, I      16 am aware that their membership includes primarily      17 people who are not beneficiaries of the Fund. And the      18 errors made by each of the experts put forth by      19 plaintiffs failed to take that into account.      20 In contrast, because of the fact that there      21 are different groups of beneficiaries, specifically at      22 the unions, the unions are not allowed to do what the      23 various plaintiff experts have alleged.      24 Q If the entities to the service agreement were</p>
<p>1 BY MS. McCONNELL:      2 Q Did you take into consideration the fact that      3 AFM and SAG-AFTRA have fiduciary responsibilities to      4 their membership or was that not an important part of      5 your report?</p> <p>6 A Well, to the extent that you're asking me for      7 a legal opinion in terms of the existence of      8 fiduciaries, I'm not expressing any such opinion. I      9 do know that your folks expressed quite a few opinions      10 about fiduciary duties. I'm certainly aware of      11 fiduciary duties, but I've not reached any opinions      12 regarding the existence of those duties.</p> <p>13 And if I did not answer your question, I'm      14 happy to take a follow-up, but that's what came to      15 mind as you -- based on your question.</p> <p>16 Q Yeah. I want you to assume that there are      17 fiduciary duties. I'm not asking you whether there      18 are or there are not.</p> <p>19 <b>(Assuming that there are fiduciary duties, did      20 you consider what those obligations would be in      21 preparing your report?)</b></p> <p>22 MR. THOMAS: Objection.</p> <p>23 THE WITNESS: Yes</p> <p>24 MR. THOMAS: Overbroad and vague.</p> <p>25</p>	<p>Page 55</p> <p>1 identical but they were for-profit businesses rather      2 than nonprofits, can you think of any portion of your      3 analysis that you would have -- would have approached      4 differently?</p> <p>5 A I think I answered that --</p> <p>6 MR. THOMAS: I'm just going to object that      7 it's vague and overbroad. But I'm sorry to be slow on      8 the draw there.</p> <p>9 THE WITNESS: Well, I think it's also asked      10 and answered, but let me try to answer it that way.</p> <p>11 I think I've answered the -- this      12 substantively, the identical question before. I've      13 told you that I was aware of their -- the tax status      14 of each of these defendants and that I've not      15 reconstituted or redone my engagement on the fly right      16 now based upon some group of entities that have not      17 been my clients and have not been involved in this      18 situation from the very beginning.</p> <p>19 BY MS. McCONNELL:</p> <p>20 Q I'm asking you to -- I'm -- I'm giving you a      21 hypothetical and asking you to assume that the      22 entities to the service agreement were for-profit      23 businesses rather than nonprofits.      24 And in that situation is there any portion of      25 your analysis that you would have approached</p>

1 differently?

2 A If this question is important to you, I will

3 endeavor to answer it; however, I cannot answer it

4 right now without looking at my report. I am happy to

5 look at my report. As you know, my report is lengthy.

6 It is 28 pages long. I suspect it will take me

7 probably an hour and a half to try to formulate an

8 answer and if your question's important to you, I'll

9 devote that hour and a half to it on the record.

10 But it is a possibility that I might need

11 even more time and I just want to warn you before I

12 start reading a report and thinking about it that you

13 know what you've asked.

14 Do you really want me to start that now?

15 Q I will tell you that all of my questions are

16 extremely important to me.

17 A Good.

18 Q But I do not want --

19 A Let me take the hour and a half.

20 Q No. I do not want you to sit there and read

21 the report. I was asking you if you could think of

22 anything -- because you obviously spent a lot of time

23 preparing this report, if you could think of anything,

24 sitting here today, that you would have analyzed

25 differently, but if not, that's okay, we'll go through

1 personnel Brian Nolte.

2 Who is that?

3 A Brian's a full-time employee at Fulcrum. He

4 is a CPA. He's got probably around ten years

5 experience doing this type of work.

6 Q Do you know which -- which tasks did Brian

7 Nolte perform and which tasks did you perform that are

8 listed here?

9 A Brian generally was involved in performing

10 the analysis on what we typically called the 50-song

11 sample. The results of that are attached as -- I

12 believe it's Exhibit 2 to my report.

13 Brian also probably participated in one of

14 the phone calls. So anything that involves the

15 preparation of those exhibits, the performance of

16 those calculations or the related reporting of that in

17 phone calls, Brian would have been involved in.

18 Q Okay. Item 6 on here says, "Initial research

19 regarding the cost percentages of other music royalty

20 reporting organizations."

21 Was that done by you or Brian?

22 A I did that.

23 Q Okay. Why did you do that?

24 A One of the questions that came up is whether

25 we could find other indications of what the cost or

1 the report and when we go through it, if something

2 comes to your mind, you can let me know and I'll ask

3 you again.

4 But if you can't think of anything without

5 spending an hour and a half or more, then that's okay,

6 you can say, I can't think of anything, sitting here

7 today, without spending an hour and a half. And we'll

8 move on. Is that fair?

9 A Well, I'm not sure it's fair.

10 But -- but in any event, I've answered that

11 question two times, at least, already. I suspect the

12 only reason you're asking me a third time is you're

13 trying to squeeze out of me an answer that's different

14 than the first two that I gave you.

15 And the answer is no, I really don't think

16 that's fair. If you want me to take the time, I will.

17 Since you don't want me to take the time, I won't.

18 So what's your next question?

19 Q I'll let you know.

20 MS. McCONNELL: Let's look at the next

21 invoice, please, Nico. This is the third invoice for

22 work between -- oh, I'm sorry. Let's skip the third

23 one and let's go to the fourth invoice for work

24 February 16 through March 15.

25 Q And in addition to yourself, you have noted

1 value would be or the general cost loads, if you wish,

2 of these other reporting organizations. And so I

3 offered to perform some initial research to see if

4 there was any what I'll call low-hanging fruit that

5 would be useful one way or the other in terms of

6 addressing this question.

7 Q When you say --

8 A And -- and you're probably going to ask,

9 well, why did I say low-hanging fruit. And I realized

10 once I said that, it's going to get a question.

11 What I meant by low-hanging fruit is, I was

12 not endeavoring to have this be comprehensive. It was

13 intended as a first pass to see what observations, if

14 any, could be drawn with a research effort that was

15 not exhaustive.

16 Q When you say "cost loads," are you referring

17 to the total administrative expense of these music

18 royalty reporting organizations or something

19 different?

20 A It would include that, but it also could

21 include other things that might be useful to the task

22 that was at issue in this litigation.

23 Q How did you identify which organizations to

24 research?

25 A It was just based on Internet searches so,

1 you know, Google was my friend. You could pretty  
2 quickly find these out through the power of keyword  
3 searches.

4 Q What did you find through this initial  
5 research?

6 A I found that there wasn't anything that was  
7 particularly useful, which is why you don't see  
8 anything meaningful in the report that is separate.  
9 The detail provided by the organizations just didn't  
10 allow -- and I say "detail provided," provided  
11 publicly, so what I could get from just, you know,  
12 doing Internet searches was not sufficient to allow me  
13 to reach any conclusions one way or the other  
14 regarding the issues at hand.

15 Q Okay. Did you find that other music royalty  
16 reporting organizations incurred costs for the  
17 purchase of performer data?

18 A I didn't find that, although I didn't expect  
19 to and therefore I really wasn't looking for that.

20 What I was looking for instead was overall  
21 cost percentages and, you know, whether the funds were  
22 out of line. And the answer is, the funds were not,  
23 the funds cost were not out of line in light of the --  
24 the different task, the more challenging task that the  
25 Fund has.

1 organizations that were responsible for providing  
2 royalty payments to nonfeatured performers?  
3 A I don't recall seeing any that I could find  
4 that were publicly available.

5 Q Okay.

6 MS. McCONNELL: Okay, Nico, the next one,  
7 please.

8 Q This next invoice is for the period March 16  
9 through April 15, 2021. And if we look at the -- the  
10 list of tasks on the next page, similar question as  
11 before. Which tasks were performed by Brian Nolte as  
12 opposed to you?

13 A Brian does not have much time on this bill.  
14 I suspect that the time he has involves the document  
15 production. But I -- it's not much time so I couldn't  
16 be certain that that was the only thing with which he  
17 was involved. But I suspect that's it.

18 Q Did you scan/read the Bookman book?

19 A I did.

20 Q Okay. What inconsistencies did you find  
21 between Mr. Bookman's report and his book?

22 A I don't have any written documents or notes  
23 on that that would help me remember. I did have a  
24 conversation with legal counsel on that and they're --  
25 the stuff I gave them was probably more complete than

1 But it was not sufficiently clear based on  
2 the variations that I was finding that I could draw  
3 any statistic conclusions from that, which is why I  
4 gave you the answer I did a minute ago.

5 Q Okay. Why do you think that the Fund has a  
6 more challenging task than these other music royalty  
7 reporting organizations?

8 A Most of these organizations have a task that  
9 might be equivalent to SoundExchange. For example,  
10 they know who the copyright owners are, they know who  
11 the featured artists are, these are people and  
12 beneficiaries that are more obvious and -- and have a  
13 greater payment.

14 So those folks are much more likely to say,  
15 hey, I -- I got to be paid and -- and here's my  
16 information and -- versus folks that are both more  
17 numerous, as well as have much smaller allowance, and,  
18 in part, because of those two things, do not have as  
19 much public information about it.

20 So it is inappropriate to look at, for  
21 example, SoundExchange's costs and equate those to the  
22 Fund because the Fund's task is more complicated and  
23 more difficult. And the same thing is true for some  
24 of these others.

25 Q Did you look into any music royalty reporting

1 I'll be able to give you now. So I'm certainly not  
2 going to try to tell you that I've got a sufficiently  
3 good photographic memory that I can tell you what that  
4 was a month ago.

5 But -- but generally speaking, Mr. Bookman  
6 claims that if -- in his two reports, that if you do  
7 something that is not required through your exempt  
8 purpose, that you're going to ruin your entire tax  
9 exempt status and -- and that you'll just be done with  
10 it. You'll ruin your organization and so you can't  
11 possibly do what -- what these folks have done.

12 In contrast, Mr. Bookman's book spends the  
13 majority of its time explaining unrelated business  
14 income and mechanics of when unrelated business income  
15 would apply, when it would not apply, what are the  
16 cases involved. And it's -- the book is, despite its  
17 title, largely a book on unrelated business income.

18 So it's kind of hard on one side for  
19 Mr. Bookman to say, oh, golly, if you did this you'd  
20 have unrelated business income and you're done, you  
21 guys might as well throw off your -- you know, tear up  
22 your tax exemption because you're -- you're just an  
23 evil place, when he writes an entire book on reporting  
24 for -- reporting for that.

25 Second, although it's not the focus of the

1 book, although I would suggest it should have been  
2 more of a focus than it was, Mr. Bookman does  
3 acknowledge and describe inurement. And Mr. Bookman  
4 in his report, or reports, plural, fails to address  
5 the importance of inurement, that it would exist in  
6 this situation if the unions did what he claims they  
7 were required to do.

8 Those are the two things that immediately  
9 come to mind.

10 Q Do you --

11 A Pardon me, I could -- I could look at the  
12 book again, maybe I'd come up with a third or fourth  
13 thing, but I haven't looked at the book since I first  
14 did this and reported to legal counsel.

15 Q The unions didn't report the service fee  
16 income as unrelated business income, did they?

17 A I have not seen their -- their tax returns so  
18 I -- I could not tell you one way or the other.

19 Q Okay. If they didn't, if you assume that  
20 they did not report the service fee income as their  
21 unrelated business income, would they face any sort of  
22 repercussion by the IRS?

23 MR. THOMAS: Object to the form; incomplete  
24 hypothetical, calls for speculation.

25 THE WITNESS: Well, I've not addressed

1 occur, I'd actually be surprised if Jenner & Block  
2 didn't ask me to take additional time looking at it  
3 that I've not yet done. But as of this moment, I've  
4 told you what I've done.

5 Q Okay. You didn't provide a rebuttal report  
6 in this case, right?

7 A I think you're really more saying a  
8 surrebuttal report because the three expert reports  
9 that -- that talk about much of this would be in their  
10 second report. And Rule 26 in terms of experts do not  
11 provide for a surrebuttal report.

12 Q No.

13 A But to -- but to answer your question  
14 directly, I did not issue a rebuttal report.

15 Q Your report and Mr. Bookman's report happened  
16 on the same day. They were exchanged on the same day.  
17 Mr. Bookman provided a rebuttal report to your report,  
18 which you've read and you've mentioned that you've  
19 read, but you did not provide a rebuttal report to  
20 Mr. Bookman's report, correct?

21 A That is what I just told you, yes. Why --  
22 I'm not sure I know what additionally you're asking me  
23 that I haven't just already told you.

24 But go ahead.

25 Q Did you review Ms. Kerry Adams' report?

1 their -- the unions' requirements for unrelated  
2 business income in this situation. It is not a  
3 foregone conclusion that it -- it would be unrelated  
4 income or that there'd be tax. I've not talked with  
5 the unions' various tax preparers or seen their  
6 returns so I -- it would be premature for me to reach  
7 a conclusion that you've now asked me to jump to.

8 BY MS. McCONNELL:

9 Q Okay. You're not planning on providing any  
10 opinion at trial about the unions' 990s or their --  
11 whether they should have marked this income as  
12 unrelated business income?

13 A I can't answer that yes or no because you're  
14 asking me to tell the future. You're saying my plans.  
15 My -- my plans are to tell the truth on questions that  
16 someone asks me that the Court wants me -- to hear, to  
17 hear an answer from.

18 If Mr. Bookman, for example, wants to show up  
19 at trial -- and by the way, his deposition hasn't  
20 occurred so I have no idea what his deposition is  
21 going to come out of that. But if Mr. Bookman wants  
22 to say, oh, golly, I've looked at this and this is  
23 dead wrong and, you know, shame on the unions and  
24 everything else, assuming this testimony that I don't  
25 know is going -- has even happened or will happen does

1 A No. Well, hold on. Hold on. Kerry Adams,  
2 I'm sorry. Ms. Adams -- Kerry? Hold on. Hold on.  
3 Q Holding.  
4 A No, my apologies. I have a short report  
5 dated March 26, 2021, from Kerry Adams. So, yes, I've  
6 seen that.

7 Q Did you formulate any opinions on Ms. Adams'  
8 report?

9 A I'll have to look at it.

10 That report has a three-sentence paragraph  
11 under opinions and conclusions. One of those  
12 sentences is that, "None of the major CMOs around the  
13 world annually pay a percentage of their revenues to  
14 purchase data from third parties."

15 So I think that is the total of the opinion  
16 that you're asking me about. And I've not formulated  
17 anything or I'm suggesting that I have a list of  
18 anyone who is in the same situation as the Fund that  
19 would do what that one sentence says. So in that  
20 sense I guess I have no rebuttal other than perhaps  
21 say it's irrelevant and -- and doesn't prove anything.  
22 But if -- if that's what you -- if that's what you  
23 want for rebuttal, then, sure, I guess I have that.

24 Q I really don't want you to say anything or  
25 not say anything. I'm trying to figure out what your

<p style="text-align: right;">Page 70</p> <p>1 opinions are so that when you testify at trial we know 2 what your opinions are. So if they're -- if you're 3 not planning on providing an opinion on Ms. Adams' 4 report, then that's fine. But if you're -- now you're 5 saying your opinion on Ms. Adams' report is that it's 6 irrelevant?</p> <p>7 A Well, I told you earlier in this deposition 8 that I did not find -- first of all, the publicly 9 available information would typically not disclose 10 what you just asked me about earlier. What you had 11 asked me about earlier is the same thing that 12 Ms. Adams is reporting in that one single sentence. 13 The fact that -- that someone does not 14 include in their financial statements an explicit 15 disclosure regarding paying a percentage of their 16 royalties does not mean that it doesn't exist. It 17 simply means that those companies were following the 18 disclosures required under generally accepted 19 accounting principles and that those principles, by 20 and large, do not require what she says they didn't 21 disclose.</p> <p>22 So the fact that someone did not disclose 23 something that they weren't required to disclose does 24 not prove that it doesn't exist. It just simply 25 proves that she was looking in the wrong spot or that</p>	<p style="text-align: right;">Page 72</p> <p>1 what questions Jenner &amp; Block's going to have. I 2 don't know what questions the Court's going to have. 3 And as a result, I don't have any plans other than to 4 show up and tell the truth.</p> <p>5 Q Do you know what Ms. Adams was reviewing in 6 order to prepare her report?</p> <p>7 A Well, it looks like she's got this exhibit, 8 and it would appear that she's looking at those 9 things.</p> <p>10 Q You think that she's looking at what things?</p> <p>11 A I'm simply saying that she's -- she mentions, 12 says, "A spreadsheet reflecting the data collected to 13 date is attached as Exhibit 2."</p> <p>14 And so I have a copy of a spreadsheet and 15 it's a two-page document and I believe that is the 16 item to which she is referring.</p> <p>17 Q Okay. Did you review Ms. Barry Kessler's 18 report?</p> <p>19 A Yes.</p> <p>20 Q Okay.</p> <p>21 A And -- and just to make sure we're on the 22 same -- there's a March 26, 2021 report on the 23 letterhead of DAS, and I have looked at that.</p> <p>24 Q Okay. Did you formulate any opinions on 25 Ms. Kessler's report?</p>
<p style="text-align: right;">Page 71</p> <p>1 where she was looking because it's the only spot 2 available simply doesn't disclose it. So it doesn't 3 prove anything.</p> <p>4 Additionally, for the opinion to be useful 5 for anything, one first has to state or know that the 6 organization to which she's making a comparison is in 7 a comparable situation. An appraiser might think of 8 that as a guideline firm or a guideline transaction. 9 Absent there being such sufficient similarity, the 10 comparison is ill-advised and should not be done.</p> <p>11 Now, I -- the legal counsel of Jenner &amp; Block 12 have not asked me about that. You have. If you want 13 to ask me that at -- at trial, I'll give you the same 14 answer I just gave you. I guess given that you just 15 asked the question, Jenner &amp; Block may decide that's a 16 pretty good answer and maybe I should ask Mr. Nolte 17 that at trial.</p> <p>18 But the answer is, you say what I'm planning 19 to do, I'm not planning to do anything other than show 20 up and answer people's questions. I don't get to make 21 a presentation. It's not like I show up and am given 22 a screen and an anvil or an easel and say, here, go 23 put on your presentation.</p> <p>24 I get to answer questions, and I don't know 25 what questions you're going to have. I don't know</p>	<p style="text-align: right;">Page 73</p> <p>1 A Certainly I had reactions as I went through 2 it, yes.</p> <p>3 Q Okay. What were your reactions?</p> <p>4 A Okay. This is going to be a long and lengthy 5 answer because I have to reread the whole report in 6 order to figure that out. I don't have anything 7 prepared, but I'm happy to do what you just asked.</p> <p>8 Q That's fine, we'll skip it.</p> <p>9 Did either Ms. Adams' report or Ms. Kessler's 10 report cause you to reconsider any of your own 11 conclusions from your March 8 report?</p> <p>12 A If by "reconsider" you mean carefully think 13 about it, yes, I did carefully think about it.</p> <p>14 Q Okay. Did it cause you to want to change 15 anything in your March 8 report?</p> <p>16 A No. In fact, it confirmed that what I had 17 was correct because the items that, for example, 18 Ms. Kessler said were -- they had problems with them.</p> <p>19 And so I'm thinking to myself, well, if -- if this is 20 the reasons why my report is wrong and those reasons 21 are not correct, then I guess my report's fine.</p> <p>22 Q Have you ever done any work for SoundExchange 23 before?</p> <p>24 A Nothing comes to mind.</p> <p>25 Q Okay. Did you speak to anyone at</p>

<p>1 SoundExchange before completing your report?</p> <p>2 A Not in connection with this assignment.</p> <p>3 Q Okay. Did Brian assist you in preparing any</p> <p>4 part of your March 8 report?</p> <p>5 A Your question's quite broad, so as broad as</p> <p>6 it is, I'd have to answer yes.</p> <p>7 Q Did Brian write the March 8 report?</p> <p>8 A No.</p> <p>9 Q Okay. You wrote it?</p> <p>10 A I did.</p> <p>11 Q Okay. You talked about Brian working on the</p> <p>12 50-song study, correct?</p> <p>13 A Well, specifically the calculation that is</p> <p>14 attached as Exhibit 2 to my report.</p> <p>15 Q I'm just checking because you said Exhibit 2.</p> <p>16 I'm not sure if it is Exhibit 2 so I just want to</p> <p>17 double-check.</p> <p>18 A Well, my apologies, I thought it was</p> <p>19 Exhibit 2. But what it is it's -- it's the</p> <p>20 calculation involving the -- the error rate that</p> <p>21 exists as a result of using web-based data instead of</p> <p>22 other data.</p> <p>23 I would invite your attention to</p> <p>24 conclusion B, as in boy, that starts on page 17 of my</p> <p>25 March 8th report.</p>	<p>Page 74</p> <p>1 pursuant to my engagement letter Mr. Thomas or</p> <p>2 Mr. Sullivan can call me up and say, hey, Nolte, we</p> <p>3 want you to do whatever or what do you think about</p> <p>4 whatever, and I'll -- I think I -- I most certainly</p> <p>5 will answer their questions pursuant to the engagement</p> <p>6 letter that I've already issued.</p> <p>7 Similarly, I'm quite sure that they're going</p> <p>8 to want me to show up and testify, and I believe I've</p> <p>9 agreed to do that, too.</p> <p>10 Q Yeah, you answered my question.</p> <p>11 There aren't any pending assignments that you</p> <p>12 know of at this time?</p> <p>13 A Not that I'm aware of.</p> <p>14 Q Okay. You reviewed a number of depositions</p> <p>15 in this case, correct?</p> <p>16 A I did.</p> <p>17 Q Did you review Mr. Crabtree-Ireland's</p> <p>18 deposition testimony from the Blondell v. Bouton case</p> <p>19 out of New York?</p> <p>20 A I don't believe so.</p> <p>21 Q Okay. Were you aware of the Blondell versus</p> <p>22 Bouton case based in New York?</p> <p>23 A I was aware of another case by the name of</p> <p>24 Blondell, so I guess the answer is yes.</p> <p>25 Q What do you know about that case?</p>
<p>1 Q So Table 9 is the error rate; is that</p> <p>2 correct?</p> <p>3 A Correct. But the underlying mathematics are</p> <p>4 in Exhibit 2. If you look at the footnotes in that</p> <p>5 section, they're pretty consistently referring to</p> <p>6 Exhibit 2.</p> <p>7 Q Okay. Just to wrap up your invoices, to date</p> <p>8 I think you've billed approximately \$70,000 for your</p> <p>9 work on this case; is that right?</p> <p>10 A Whatever those bills add up to.</p> <p>11 Q Is there any unbilled work at this time?</p> <p>12 A No.</p> <p>13 Q Have you agreed to --</p> <p>14 A Well --</p> <p>15 Q -- perform --</p> <p>16 A Well, hold on a minute. Never mind. I'm --</p> <p>17 I'm incorrect.</p> <p>18 I'm sorry, go ahead, what were you going to</p> <p>19 say?</p> <p>20 Q Have you agreed to perform any work on this</p> <p>21 case before trial?</p> <p>22 A Well, I haven't been asked to do any work.</p> <p>23 That may be different than what you've asked.</p> <p>24 Q Well, that's what I was asking.</p> <p>25 A I think there's a running agreement that</p>	<p>Page 75</p> <p>1 A If I use -- interpret the word "know" in its</p> <p>2 common usage which indicates a certain level of</p> <p>3 certainty, the answer is probably nothing.</p> <p>4 I do know -- my understanding is that there</p> <p>5 was a class action lawsuit. Blondell was the class</p> <p>6 representative. I believe the matter has been</p> <p>7 resolved or if it's not resolved, it's certainly</p> <p>8 farther along than -- than the Risto case is.</p> <p>9 And that there was some overlap in the sense</p> <p>10 that the -- the Fund or the lawyers indicated that in</p> <p>11 response to information that I would need that that</p> <p>12 had already been accumulated as a result of the</p> <p>13 Blondell case. So that's why it came up. It came up</p> <p>14 as like, oh, why don't you just give him the stuff</p> <p>15 from Blondell.</p> <p>16 Q Okay.</p> <p>17 A And -- and so I got some stuff and -- and</p> <p>18 I've kind of given you a brain dump of everything I</p> <p>19 know, which is not much, about Blondell.</p> <p>20 Q Okay. But one of the things, you were not</p> <p>21 given the Duncan Crabtree-Ireland deposition from the</p> <p>22 Blondell case? You mentioned --</p> <p>23 A I was not.</p> <p>24 Q -- other stuff, but...</p> <p>25 A Yeah, I'm sorry for interrupting. I didn't</p>

<p>1 mean.</p> <p>2 I was not given that deposition transcript.</p> <p>3 Q Okay. Did you -- it doesn't look like you</p> <p>4 reviewed any of the trustee depositions in this case</p> <p>5 other than Mr. Crabtree-Ireland, Mr. Hair or Ms. Taub;</p> <p>6 is that correct?</p> <p>7 A I listed those that I received. If it's not</p> <p>8 on the list, it's because I didn't see it and -- and</p> <p>9 obviously didn't look at it. So if you have some</p> <p>10 other depositions and they're not on the list, then I</p> <p>11 don't have them.</p> <p>12 Q Okay. Do you recall deciding not to review</p> <p>13 the Mr. Joyce, Mr. Bouton or Mr. Gagliardi</p> <p>14 transcripts?</p> <p>15 A I made no such decision.</p> <p>16 Q Okay. Was it important for your analysis to</p> <p>17 know what factors the trustees considered when they</p> <p>18 voted for the service fee?</p> <p>19 MR. THOMAS: Objection to the form, vague.</p> <p>20 THE WITNESS: Was it important? Well, I -- I</p> <p>21 don't think I can answer that without being misleading</p> <p>22 no matter how I answer it. So let me try -- if you</p> <p>23 don't mind, I'll give you a narrative and maybe that</p> <p>24 will help. Because I -- if I answer yes or no, no</p> <p>25 matter what answer I give you, it's going to be a</p>	<p>Page 78</p> <p>1 A In the last three minutes or so I've not read</p> <p>2 those transcripts since you first asked me.</p> <p>3 Q Okay. In the last almost year that you've</p> <p>4 been working on this case you haven't reviewed those</p> <p>5 three transcripts, right?</p> <p>6 A Again, I -- you're just asking me stuff I</p> <p>7 already answered for you. I'm -- I guess if you want</p> <p>8 to do that, that's fine.</p> <p>9 But I have told you that the complete list of</p> <p>10 the transcripts are on my report. I've told you if</p> <p>11 it's not on my report, then I didn't look at them. I</p> <p>12 told you I did not make a decision not to look at any.</p> <p>13 So I'm not sure what else you're asking me. But</p> <p>14 that's the situation with those three expert</p> <p>15 depositions.</p> <p>16 Q You mentioned that you were asked to arrive</p> <p>17 at an independent conclusion about the services</p> <p>18 agreement; is that accurate?</p> <p>19 A I was to arrive at my conclusions</p> <p>20 independently, yes.</p> <p>21 Q Okay. What were you -- let me put it this</p> <p>22 way.</p> <p>23 MS. McCONNELL: Maybe, Nico, this is a good</p> <p>24 time for the retention agreement, which we can mark as</p> <p>25 Exhibit 3.</p>
<p>Page 79</p> <p>1 mess.</p> <p>2 BY MS. McCONNELL:</p> <p>3 Q Okay.</p> <p>4 A Okay. On -- on one side of the coin, I was</p> <p>5 asked to reach an independent conclusion. So the work</p> <p>6 was not -- read what Crabtree-Ireland said and agree</p> <p>7 with it. That wasn't the assignment. In fact, the</p> <p>8 assignment was just the opposite. So in that sense</p> <p>9 the answer would have to be no, that was not the</p> <p>10 assignment. And I did the assignment as an</p> <p>11 independent person.</p> <p>12 On the other side of the coin, I was given</p> <p>13 those transcripts and obviously the questioning in</p> <p>14 those transcripts included considerations that the</p> <p>15 various people had in mind to the best of their</p> <p>16 recollection. And I was interested in that.</p> <p>17 I don't want to tell you that I skimmed past</p> <p>18 that or said I don't care, and, in fact, you'll see</p> <p>19 that I've quoted some items from the depositions in my</p> <p>20 report. So as a result, I -- it's -- it's -- that's</p> <p>21 how I considered the information.</p> <p>22 Q You didn't review the other three trustees,</p> <p>23 right, Mr. Joyce, Mr. Bouton or Mr. Gagliardi, so you</p> <p>24 don't know what factors they might have considered or</p> <p>25 might not have considered, true?</p>	<p>Page 81</p> <p>1 (Exhibit 3 marked.)</p> <p>2 BY MS. McCONNELL:</p> <p>3 Q This is your retainer agreement that's dated</p> <p>4 June 12, 2020, and under "Description of Work" it</p> <p>5 says, "Fulcrum's work, to be performed under your</p> <p>6 supervision, will consist of financial, accounting and</p> <p>7 valuation analysis necessary to evaluate the various</p> <p>8 contentions arising in this dispute."</p> <p>9 Is that an accurate recitation of what your</p> <p>10 assignment was in this case?</p> <p>11 A Well, it's not inaccurate, but I would invite</p> <p>12 your attention to Roman numeral I of my March 8</p> <p>13 report, which is under this nearly identical heading</p> <p>14 of description of engagement, and in my report I give</p> <p>15 you more -- I -- I do that with greater specificity.</p> <p>16 Q Yeah. You specifically say that you've been</p> <p>17 asked to address the reasonableness of the amounts</p> <p>18 that the Fund pays to the AFM and SAG-AFTRA, right?</p> <p>19 A It does say that.</p> <p>20 Q Okay. So did you end up providing a</p> <p>21 financial or accounting analysis?</p> <p>22 A Well, that's what I do for a living so I</p> <p>23 guess the answer has to be yes. The matters included</p> <p>24 in my March 8th report are financial, accounting,</p> <p>25 economic and valuation matters.</p>

<p style="text-align: right;">Page 82</p> <p>1 Q How do you define the word "cost"?</p> <p>2 A Cost would be a synonym for expenditure.</p> <p>3 Q How do you define the term "value"?</p> <p>4 MR. THOMAS: Objection; overbroad, vague.</p> <p>5 THE WITNESS: Yeah, you really have to have a context for that. Value is an amount. But I'm not sure that helps you much.</p> <p>6 Usually in the context of my work I am asked for the value or amount of the fairness of some asset</p> <p>7 or transaction. So I'm reaching an opinion regarding the fairness of an amount or the fairness of a value.</p> <p>8 BY MS. McCONNELL:</p> <p>9 Q And is that actually what you did in this case?</p> <p>10 A Yes.</p> <p>11 Q Okay. Were you looking -- did you approach this assignment by looking at the value from the Fund's perspective?</p> <p>12 A In part, yes.</p> <p>13 Q Did you approach this assignment by looking at the value from the unions' perspective?</p> <p>14 A In part, yes.</p> <p>15 Q Did you consider yourself to be providing a neutral evaluation of the value of the data that was being provided?</p>	<p style="text-align: right;">Page 84</p> <p>1 unions if you were asked to do that?</p> <p>2 MR. THOMAS: Objection; vague.</p> <p>3 THE WITNESS: Well, I've not been asked to.</p> <p>4 If you -- I think what you're asking me is, am I capable of doing so, and the answer is sure, as the accounting portion of my skill base would allow me to address such items. I have the confidence and capabilities of doing that.</p> <p>5 BY MS. McCONNELL:</p> <p>6 Q Have you been presented with any accounting data that would enable you to do it? Even though I understand that you could potentially do it given your background, have you been provided with any of the accounting data to enable you to do it?</p> <p>7 A No.</p> <p>8 Q Okay.</p> <p>9 MS. McCONNELL: Okay. Let's pull up the -- well, before you do that.</p> <p>10 Q What -- what accounting information would you need to be able to calculate the cost to the unions?</p> <p>11 MR. THOMAS: Object to the form.</p> <p>12 THE WITNESS: When I've done these sorts of assignments, I do look at the financial statements and underlying general ledgers for whatever period of time is relevant to the analysis. I speak with the</p>
<p style="text-align: right;">Page 83</p> <p>1 A You're asking for my state of mind?</p> <p>2 Q Yes.</p> <p>3 A Sure. My state of mind is that I'm doing this with independence and neutrality.</p> <p>4 Q Did you approach this assignment by looking at the cost to the unions for providing the data?</p> <p>5 THE WITNESS: Ms. Bolton, could you reread the question, please?</p> <p>6 (Record read.)</p> <p>7 THE WITNESS: I considered cost, but I have not used cost as the basis for valuing intellectual property, which would be the typical approach or conclusion reached when addressing intellectual property.</p> <p>8 BY MS. McCONNELL:</p> <p>9 Q Could you tell us what the cost is to the unions for providing the data?</p> <p>10 A I have not assembled that --</p> <p>11 MR. THOMAS: Objection; vague, overbroad.</p> <p>12 THE WITNESS: Yeah. The answer is, I have not assembled that because I concluded it was not relevant to the value that I was being asked to address.</p> <p>13 BY MS. McCONNELL:</p> <p>14 Q Are you able to assemble the cost to the</p>	<p style="text-align: right;">Page 85</p> <p>1 accounting and management personnel that are responsible for running the organization in order to answer questions or gain context into the physical accounting data that I've been provided.</p> <p>2 That's very general, I appreciate that,</p> <p>3 but -- but you -- you asked a general question.</p> <p>4 BY MS. McCONNELL:</p> <p>5 Q What types of accounting data would be relevant to the analysis?</p> <p>6 A Your assuming the analysis is even relevant itself, correct?</p> <p>7 Q Correct.</p> <p>8 A Because I've already told you that a cost is not going to be a relevant analysis to the value of intellectual property.</p> <p>9 Q You've told me that, yes.</p> <p>10 A So answering a question about this does not suggest at all that anything I'm about to tell you is relevant to anything, in my view.</p> <p>11 Q We can stipulate to that, that you do not think it's relevant.</p> <p>12 A Okay. All right. So with -- with that in mind, what's your question about this irrelevant analysis?</p> <p>13 Q What accounting data would you need to</p>

1 calculate the cost for providing the data?  
 2 A I told you I would start with the financial  
 3 statements and the general ledger. I gave you that in  
 4 response to an earlier answer. I would ask for those  
 5 documents first.  
 6 It is likely, based on discussions with  
 7 management and accounting personnel, that I would need  
 8 payroll journals associated with people that were  
 9 performing that work. I would not initially ask for  
 10 payroll journals because it may not be necessary,  
 11 although I suspect it is, but I also know that people  
 12 don't like giving up payroll journals until there's  
 13 absolutely a need to do so. So I don't ask for that  
 14 as a first step.  
 15 To the extent that there are major  
 16 subcontracts, I do look for -- I will usually get  
 17 those agreements to make certain I understand what the  
 18 scope of the services are. There's a good chance that  
 19 I would be looking at invoices for -- or other  
 20 supporting documentation for certain expense amounts.  
 21 Now, I've done a number of those assignments,  
 22 and I -- I think in those other assignments where the  
 23 work would be relevant that's the type of information  
 24 that I -- I typically get.  
 25 Q What are you looking for -- what would you be

1 litigation that are not specifically cited in the  
 2 conclusions expressed herein, but which provide  
 3 background information and context."  
 4 Are you able to tell us which additional  
 5 documents provided background information and context?  
 6 A If given the time to do so, sure.  
 7 Q How would you do that?  
 8 A Well, all the records that I have are kept on  
 9 a secure server in a spot specifically designated for  
 10 that client. So I could look at the list of records  
 11 in that section Roman II, as well as the notes to  
 12 which -- that are being referred to in Roman II.  
 13 So, for example, one of the items talks about  
 14 items as referenced in here so there's -- in the  
 15 course of this report there are -- looks like 66  
 16 footnotes. So I could look at the 66 footnotes.  
 17 I could look at the documents listed in  
 18 Roman II and then compare that to everything that I've  
 19 received that I store in the manner that I described  
 20 at the beginning of this answer and come up with  
 21 whatever the difference is.  
 22 I could do that. Nobody wants to pay for  
 23 that clerical effort, which is why you get a paragraph  
 24 like this as almost boilerplate in every report like  
 25 this.

1 looking for in the financial statements and the  
 2 general ledger?  
 3 A The financial statements are a good summary  
 4 of the results of operations and financial position of  
 5 an organization as of a point in time, as well as for  
 6 whatever period is then ended. And so almost any  
 7 financial analysis would start with the financial  
 8 statements.  
 9 Further, I obtain the general ledger because  
 10 that provides the detailed transactions that build up  
 11 the balances that are contained in the financial  
 12 statements.  
 13 Q Okay.

14 MS. McCONNELL: Okay. Nico, can you send the  
 15 report, please.

16 And I think you probably have it in front of  
 17 you, but you are free to download it as well.

18 Q On page 2 of your report before the Roman  
 19 numeral heading III --

20 MS. McCONNELL: And, Ms. Bolton, if we could  
 21 attach this as Exhibit 4, please.

22 (Exhibit 4 marked.)

23 BY MS. McCONNELL:

24 Q It says, "Fulcrum personnel reviewed and  
 25 considered additional documents produced in this

1 Q Okay. And it says, "Fulcrum personnel  
 2 reviewed."  
 3 Other than you and David Nolte, was there  
 4 other Fulcrum personnel involved? I'm sorry, did I  
 5 say David Nolte?  
 6 A You did. Other than -- than Brian and  
 7 myself, there were no other personnel involved in this  
 8 matter from my firm. And I was involved with the  
 9 initial review of all records.  
 10 Q Okay. Did you review Section 114 of the  
 11 Copyright Act?  
 12 A I'm aware of it, but, no, I don't -- I mean,  
 13 I'm sure I've read it. But the assignment was not  
 14 formulated as reaching conclusions regarding any  
 15 portion of the Copyright Act.  
 16 Q Do you think that you read it in connection  
 17 with this assignment or are you saying that you've  
 18 read it at some point in time?  
 19 A Well, I think it was in connection with this  
 20 assignment. I'm sure the complaints or answers or  
 21 someone else quoted it, and I -- I would have read it  
 22 as it was presented.  
 23 Q Okay. Did you know that the Copyright Act  
 24 says that Fund is only to deduct reasonable costs?  
 25 A I don't doubt that. I've not specifically

<p>1 reached that conclusion. But I don't doubt that.</p> <p>2 Q Were you told to assume at any time that the</p> <p>3 Copyright Act's language regarding reasonable costs</p> <p>4 did not apply to the Fund?</p> <p>5 A No.</p> <p>6 Q Okay. Are you planning to provide testimony</p> <p>7 at trial about the Copyright Act?</p> <p>8 MR. THOMAS: Object to the form, vague.</p> <p>9 THE WITNESS: Well, yeah, you can get</p> <p>10 different answers depending on what portion of -- of</p> <p>11 your question you want to focus on.</p> <p>12 To the extent that you're asking me for a</p> <p>13 legal opinion, I won't be providing any legal</p> <p>14 opinions. So to the extent someone says, hey, hey,</p> <p>15 Nolte, read this and tell me what that means as a</p> <p>16 matter of law, no judge is going to let me answer that</p> <p>17 question, and I probably wouldn't answer it even if I</p> <p>18 was asked or allowed to.</p> <p>19 What I am doing is what's described in the</p> <p>20 description of assign -- engagement. And I'm pretty</p> <p>21 sure that that relates to the Copyright Act.</p> <p>22 BY MS. McCONNELL:</p> <p>23 Q Do you think that the Copyright Act's</p> <p>24 language about reasonable cost conflicts with your</p> <p>25 assignment which was to evaluate the value of the data</p>	<p>Page 90</p> <p>1 of the conversation.</p> <p>2 Q Okay. There were a lot of nos in your</p> <p>3 answer, but I think what you're saying is that</p> <p>4 Jenner &amp; Block lawyers were on every conversation with</p> <p>5 Fund personnel?</p> <p>6 A Yeah, I apologize for any ambiguity.</p> <p>7 But anytime I spoke with Fund personnel a</p> <p>8 lawyer from Jenner &amp; Block was present at all times.</p> <p>9 Q Okay.</p> <p>10 A And I apologize for any confusion.</p> <p>11 Q That's okay.</p> <p>12 Did you conduct any interviews with any union</p> <p>13 personnel?</p> <p>14 A None come to mind.</p> <p>15 Q Did you ever speak with Ray Hair?</p> <p>16 A I don't believe so.</p> <p>17 Q Did you ever speak with Duncan</p> <p>18 Crabtree-Ireland?</p> <p>19 A I don't -- I don't recall any such meetings</p> <p>20 with anyone from the unions.</p> <p>21 Q Okay. Included in the defendants' document</p> <p>22 production to the plaintiff there were several</p> <p>23 thousands e-mail requests from Fund personnel to union</p> <p>24 personnel asking for session reports.</p> <p>25 Did you review any of those e-mails or their</p>
<p>Page 91</p> <p>1 and services being provided?</p> <p>2 MR. THOMAS: Object to the form.</p> <p>3 THE WITNESS: I don't see any conflict.</p> <p>4 BY MS. McCONNELL:</p> <p>5 Q Do you recall reviewing either version of the</p> <p>6 Fund's trust agreement?</p> <p>7 A I know I've had it available. But I -- I was</p> <p>8 not reading it as a necessary predicate to any of my</p> <p>9 conclusions.</p> <p>10 Q Okay. Did you conduct any interviews with</p> <p>11 Fund personnel?</p> <p>12 A Well, I had conversations. If you want to</p> <p>13 call those interviews, I guess the answer would have</p> <p>14 to be yes. So, sure, go ahead.</p> <p>15 Q Okay. Who?</p> <p>16 A I spoke with Ms. Taub. I spoke with</p> <p>17 Ms. Sandell. And I spoke with the Fund's chief</p> <p>18 financial officer whose name escapes me at this</p> <p>19 moment, but I'm sure I have it somewhere.</p> <p>20 Q Okay. And you said you had phone calls with</p> <p>21 these three people. Were Jenner &amp; Block attorneys on</p> <p>22 those calls as well?</p> <p>23 A There was no phone call with the Fund</p> <p>24 personnel during which Jenner &amp; Block lawyers were not</p> <p>25 there or at least a lawyer was there for 100 percent</p>	<p>Page 91</p> <p>1 responses?</p> <p>2 A I certainly did not study any volume of</p> <p>3 e-mails. Whether I saw some or not, they may be part</p> <p>4 of what I had but I -- that certainly was not the</p> <p>5 focus of -- of what I was trying to do.</p> <p>6 Q Do you know if anyone ever reviewed and</p> <p>7 counted how many requests were made and how many</p> <p>8 requests were answered?</p> <p>9 A I certainly have not done that. So -- and</p> <p>10 I -- and I wouldn't be expressing any opinion about a</p> <p>11 tabulation that I've not done.</p> <p>12 Q Okay. I think you answered this, forgive me.</p> <p>13 Did you review any of the Fund's -- excuse</p> <p>14 me. Did you review any of the Fund's 990s?</p> <p>15 A You did not ask that. I may -- I may have</p> <p>16 had some of those. I'd have to go back and look. I</p> <p>17 don't think I've referenced them in my report, but I</p> <p>18 don't want to tell you I didn't have them. I might</p> <p>19 have them.</p> <p>20 Q Okay. Did you review any of the unions'</p> <p>21 990s?</p> <p>22 A No.</p> <p>23 Q Okay. Would you agree with me that the</p> <p>24 unions are not in the business of selling data?</p> <p>25 A I'm happy to answer that question, but it</p>

<p>1 occurs to me I probably gave you a bad answer way long  2 ago and I don't know if it matters, it probably  3 doesn't, but -- but I got distracted by that.  4 I'm currently working on an assignment  5 involving other nonprofits. I don't know if that  6 matters to you. But I -- I think you did ask work my  7 current firm is with working on of nonprofits, and  8 I've actually got one actively going on right now.  9 Q Okay. What is it?  10 A Well, I'm not entirely certain I should be  11 talking too much about it because I -- it's  12 consultation only for settlement purposes. But it  13 does involve the United States Olympic Committee.  14 Q Okay.  15 A And -- and I probably shouldn't say too much  16 more than that. But it is a nonprofit organization  17 and a substantial one. And I -- I believe one of the  18 questions that you asked probably would have had me  19 identify that but I just didn't think of it at the  20 time it was asked.  21 Q Are -- are you providing any sort of like  22 financial valuation services for the Olympic  23 Committee?  24 A I am performing accounting work that relates  25 to a dispute between the United States Olympic</p>	<p>Page 94</p> <p>1 non-featured performers associated with approximately  2 136,000 song titles."</p> <p>3 Do you see that?</p> <p>4 A I do.</p> <p>5 Q First, you didn't help craft this response,  6 did you?</p> <p>7 A The reason I'm pausing is I realize this is  8 an amended -- or supplemental response that occurred  9 after I was engaged. No one asked me to draft this or  10 make edits to this. And so in that sense the answer  11 to your question is no.</p> <p>12 However, I can't tell you that I didn't say  13 something that might have assisted the people who were  14 drafting this in writing what they wrote. So in that  15 sense the answer would have to be, I don't know.</p> <p>16 Q Okay. Do you know whether that 136,000 song  17 title number reflects the number of song titles that  18 have been paid by the Fund or includes song titles  19 that are merely tracked for possible future payment?</p> <p>20 A Well, the best answer is, I don't know. But  21 you also told me that I should be giving you  22 information as long as it wasn't a guess. And so with  23 that, this is another answer that's almost a guess,  24 maybe a guess, but I -- I suspect this is the number  25 of song titles that are being tracked even if there's</p>
<p>Page 95</p> <p>1 Committee and a rather substantial donor regarding the  2 use of contributions.  3 Q Okay.  4 A And I've -- I've not given any testimony.  5 I've not given any reports. I've done work only for  6 settlement purposes so I really shouldn't be telling  7 you anything more. If you have follow-up questions, I  8 just want to warn you that I'm -- I may have --  9 there's some line I can't cross over and I'm getting  10 pretty close to it.  11 Q I will take your secret to my grave. Don't  12 worry.  13 Okay. Let's go back to the question that I  14 had asked you.  15 <b>Would you agree with me that the unions are</b>  16 <b>not in the business of selling data?</b>  17 A <b>That is not their primary business.</b>  18 Q This is a quick question.  19 So on page 4 of your report you quote an  20 interrogatory report -- I'm sorry. You quote an  21 interrogatory response. And I have a very discrete  22 question.  23 If you look at the third full paragraph on  24 page 4. The paragraph ends with, "Currently, this  25 database compiles information related to the</p>	<p>Page 97</p> <p>1 some missing information that would prevent complete  2 payments. But I -- I can't tell you that as a matter  3 of fact. I -- but I -- that's -- that's what I  4 suspect is the case.  5 Q Okay. On page 7 of your report, if you look  6 at Table 3, you have separated out for the years  7 ending 2013 to 2019, you have, "Distributions payable  8 at year-end," and then, "Distributions paid during the  9 year."  10 Is the services fee calculated from the  11 distributions payable column or the distributions paid  12 column?  13 A It would be based on what is payable. Well,  14 hold on a minute. That -- it's actually neither.  15 Yeah, it's actually neither. But it has two -- since  16 you gave me only two choices, it would be closer to  17 payable.  18 Q Okay. Why -- why is it neither?  19 A Well, because there are some amounts that are  20 going to be payable and then promptly paid and so they  21 don't appear on the balance sheet as of the end of the  22 year, but they would appear in the payment amounts.  23 Q But wouldn't those still be in the  24 distributions payable column?  25 A No. Well, you say "column." If you're</p>

<p style="text-align: right;">Page 98</p> <p>1 referring to the column in Table 3, that middle column 2 says, includes in the heading, "at year-end." So if a 3 check is written before year-end it's no longer in 4 that amount.</p> <p>5 Q Okay. Got it. Okay. Let's try this one. 6 Is it accurate, then, that if we add up 7 distributions paid during the year and distributions 8 payable at year-end and take the 3 percent service fee 9 from that, that that number would be accurate?</p> <p>10 A No.</p> <p>11 Q Okay.</p> <p>12 A Well, hold on a minute. When you say "that 13 number." I'm not suggesting any of these numbers are 14 not accurate. And so to the extent that you're asking 15 me to say, well, which of these numbers are 16 inaccurate, I'm not suggesting any of these numbers 17 are inaccurate. What I'm suggesting is that would be 18 a poor way of calculating the amounts owed to the 19 union, and you'd get a wrong answer.</p> <p>20 Q I guess let's just go back to the first 21 question, maybe, without looking at these actual 22 numbers.</p> <p>23 Are you aware that the service fee is 24 taken -- is calculated from distributions payable and 25 not distributions paid?</p>	<p style="text-align: right;">Page 100</p> <p>1 has to do. If the union doesn't do that, I suspect it 2 would have failed to meet a benchmark. 3 Now, it is possible of course to craft an 4 agreement, a different agreement that has additional 5 specificity in that regard. And if that's what you're 6 asking, the answer is, sure, you could do that.</p> <p>7 Q If you -- if you crafted an agreement that 8 has additional specificity with regard to benchmarks, 9 wouldn't that be more effective at creating a no-risk 10 situation for the Fund?</p> <p>11 MR. THOMAS: Object to the form. Calls for 12 speculation.</p> <p>13 THE WITNESS: Well, you're -- you're 14 addressing a different item at this point than what I 15 was initially suggesting. So the connection that 16 you're drawing I have not connected in my original 17 language. So I don't know that any answer I give you 18 is going to provide insight into my report because at 19 this point you're talking about something different.</p> <p>20 BY MS. McCONNELL:</p> <p>21 Q Okay. Are you able to answer the question? 22 A I just did.</p> <p>23 Q Okay. I'll come back to it.</p> <p>24 On the bottom of page 7, you say, "Without 25 the unions' data, the number of unclaimed participants</p>
<p style="text-align: right;">Page 99</p> <p>1 A I am aware of that, yes.</p> <p>2 Q Okay. Knowing that, would you still say that 3 the services agreement is a no-risk situation for the 4 Fund?</p> <p>5 A Yes.</p> <p>6 Q Isn't there a risk that the Fund has 7 increasing amounts of distributions payable but fails 8 to have any meaningful information from the unions 9 that allow it to make that distribution?</p> <p>10 A Well, for an individual transaction, there is 11 a possibility that the union will not have any 12 information. The fee is based on the totality of the 13 amounts received. So to the extent that you're 14 suggesting that there's -- it is the case where the 15 unions don't report on 100 percent of the amounts 16 that -- that would need to be paid, that that is 17 correct, I don't think anybody is doubting that.</p> <p>18 Q There aren't any benchmarks set forth in the 19 services agreement for the unions to meet, are there?</p> <p>20 MR. THOMAS: Object to the form, vague.</p> <p>21 THE WITNESS: Did you say there were 22 benchmarks? I just didn't hear the word.</p> <p>23 BY MS. McCONNELL:</p> <p>24 Q Benchmarks.</p> <p>25 A Well, the agreement does say what the union</p>	<p style="text-align: right;">Page 101</p> <p>1 and the amount of unclaimed royalties would be much 2 higher."</p> <p>3 What is your support for that proposition?</p> <p>4 A The data that's reported is with the benefit 5 of the union, the union data. If you didn't have the 6 union data, the problems or challenges that the Fund 7 has would be magnified. So the Fund would either need 8 to be spending more money or they'd need to -- well, 9 they'd need to be spending more money, and even then, 10 I'm not sure that they'd get an accurate answer. So 11 that's really what I'm referring to.</p> <p>12 Q And when you're referring to "unions' data," 13 are you referring to membership data or session 14 reports or both?</p> <p>15 A I'm referring to whatever information the 16 unions provide. They generally consist of session 17 reports, also known as B-reports.</p> <p>18 (Reporter clarification.)</p> <p>19 THE WITNESS: B, as in boy, so B -- capital 20 B, dash, reports.</p> <p>21 BY MS. McCONNELL:</p> <p>22 Q Are you aware that the unions -- well, I 23 guess here, are you referring to membership data, 24 meaning like contact information from the unions as 25 well or are you only referring to session reports and</p>

<p style="text-align: right;">Page 102</p> <p>1 B-forms?</p> <p>2 A I'm referring to whatever the unions want to</p> <p>3 provide. My understanding is that there are databases</p> <p>4 available where the unions, pursuant to this</p> <p>5 agreement, and as a result of having the agreement,</p> <p>6 have opened up its electronic files to the Fund. And</p> <p>7 so the Fund has information from the unions from those</p> <p>8 databases.</p> <p>9 Q Do you know how a performer, a featured</p> <p>10 performer gets added to the Fund's database to get</p> <p>11 paid?</p> <p>12 MR. THOMAS: Objection to the form.</p> <p>13 THE WITNESS: I think at this point you're</p> <p>14 probably asking me for the logistics of inputting</p> <p>15 information into the AS -- A400 system, and I would --</p> <p>16 I'm not an expert on that. You should -- well, maybe</p> <p>17 the fact that depositions are done, but you've had</p> <p>18 plenty of people to ask about that from the Fund</p> <p>19 representatives.</p> <p>20 BY MS. McCONNELL:</p> <p>21 Q Do you know what --</p> <p>22 A And -- and I wouldn't be able to -- I don't</p> <p>23 do that job so I'm not -- it's not like I'm not trying</p> <p>24 to answer it. It's just that I'm not there to do that</p> <p>25 job. I'm not -- I've not done a study of how</p>	<p style="text-align: right;">Page 104</p> <p>1 to do once they receive the data from the unions. Are</p> <p>2 you aware of the work that they do in that regard?</p> <p>3 MR. THOMAS: Objection; vague.</p> <p>4 THE WITNESS: I'm not -- I'm sorry,</p> <p>5 Mr. Thomas, go ahead.</p> <p>6 MR. THOMAS: I just objected that it was</p> <p>7 vague.</p> <p>8 But go ahead.</p> <p>9 THE WITNESS: I have not studied any of the</p> <p>10 detailed mechanics of the research personnel. And</p> <p>11 whatever information they provided in their earlier</p> <p>12 discovery responses or depositions would be the best</p> <p>13 answers. That is not what I've been asked to opine</p> <p>14 on.</p> <p>15 BY MS. McCONNELL:</p> <p>16 Q Wouldn't that affect the value of the data if</p> <p>17 the Fund has to go through it and clean it up and make</p> <p>18 sure it's up to date?</p> <p>19 MR. THOMAS: Objection; vague, misstates</p> <p>20 testimony of the fact witnesses.</p> <p>21 BY MS. McCONNELL:</p> <p>22 Q You can answer.</p> <p>23 A Well, I did anticipate that the Fund runs its</p> <p>24 own systems and would want to put the data they</p> <p>25 obtained from the unions into their own systems so</p>
<p style="text-align: right;">Page 103</p> <p>1 something gets inputted into the system. That would</p> <p>2 be done by Fund personnel.</p> <p>3 Q Do you know what work Fund personnel does to</p> <p>4 update address information and contact information</p> <p>5 that they receive originally from the unions?</p> <p>6 A Yeah, you're asking me for details of</p> <p>7 specific steps and mechanics, and I have not gotten</p> <p>8 involved in any of that.</p> <p>9 Q Would that be reflected in any of the cost</p> <p>10 data that you looked at from Ms. Taub?</p> <p>11 MR. THOMAS: Object to the form. Calls for</p> <p>12 speculation.</p> <p>13 THE WITNESS: Well, I believe it does. So,</p> <p>14 for example, you know, Ms. Taub said, here -- here's</p> <p>15 the cost of my researchers and the researchers are the</p> <p>16 folks that are doing this work. So if you say to the</p> <p>17 researchers, you got to do this work without the union</p> <p>18 data, besides getting a protest or volt or whatever</p> <p>19 you want to call it from the people who say, well, how</p> <p>20 am I supposed to do my job, and putting that aside,</p> <p>21 they would end up working a lot slower and being</p> <p>22 hampered in getting their job done.</p> <p>23 BY MS. McCONNELL:</p> <p>24 Q That's not exactly my question. So I'm --</p> <p>25 I'm referring to the cleanup work that the Fund needs</p>	<p style="text-align: right;">Page 105</p> <p>1 that the Fund could make its operation as efficient as</p> <p>2 possible. I would be shocked if the union was going</p> <p>3 to give the Fund the data in the precise form that the</p> <p>4 Fund needed it and/or that the union would volunteer</p> <p>5 to input the information into the Fund's database.</p> <p>6 I'd be further shocked, by the way, if -- if</p> <p>7 the Fund said, oh, sure, go ahead, you know, here's</p> <p>8 the keys to the kingdom and we want you at the unions</p> <p>9 to be getting direct access to the database that we've</p> <p>10 assembled over the years. So I don't -- I -- I</p> <p>11 would -- I fully understood that there was additional</p> <p>12 work that the Fund had to do to use the unions' data.</p> <p>13 Q So I'm not talking about just the mechanical</p> <p>14 inputting of data. I'm talking about actually going</p> <p>15 out and updating the data, meaning if the union</p> <p>16 provides an old address for nonfeatured performer Bob,</p> <p>17 the Fund then needs to go and find an updated address</p> <p>18 for nonfeatured performer Bob so they need to undergo</p> <p>19 additional work to clean up and update the data that's</p> <p>20 received from the unions.</p> <p>21 Wouldn't that have an impact on the value of</p> <p>22 the data that's received?</p> <p>23 MR. THOMAS: I'm going to object that that</p> <p>24 misstates the testimony of the fact witnesses and</p> <p>25 lacks foundation.</p>

<p style="text-align: right;">Page 106</p> <p>1     THE WITNESS: I don't doubt that these tens 2 of thousands of people, maybe even more than that, 3 that they occasionally move and/or they get 4 successor -- you know, there's updates needed to this. 5 Some of that information the union may be able to 6 provide and could be in -- in databases, but if it -- 7 whether the union provides it or whether the Fund 8 provides it, there is no question that the Fund has 9 ongoing communications with the beneficiaries of the 10 Fund and that I would expect that to occur.</p> <p>11 BY MS. McCONNELL:</p> <p>12     Q Don't you agree that that has an effect on 13 the value of the information that the union is 14 providing in the first instance?</p> <p>15     MR. THOMAS: Same objections; lacks 16 foundation, overbroad, misstates prior testimony.</p> <p>17     THE WITNESS: Here's what I think I'm hearing 18 you say. That there's a session report from, I don't 19 know, 1980, let's say, and since 1980 a nonfeatured 20 performer moves and the union provides data from 1980 21 that is nowhere else available, and you're suggesting 22 that that information is not valuable because in 1980 23 the union didn't know when performer Bob, to use your 24 name, was going to move ten years later.</p> <p>25     The answer to your question is, no, the data</p>	<p style="text-align: right;">Page 108</p> <p>1     A It is.</p> <p>2     Q Okay. So if the data is not accurate you 3 would agree that its value is lower?</p> <p>4     A That's why I wrote it. So if -- if -- if 5 someone says actor -- or musician Bob was involved and 6 musician Bob was really not involved, it was instead a 7 bunch of other people, then that's a problem. Now, 8 what we did in the immediately preceding portion of 9 this report is describe the inaccuracies that exist 10 when we try to use data sources other than the unions.</p> <p>11     Q Okay. So your support for these five factors 12 was the 50-song study. Is that what you're saying?</p> <p>13     A No.</p> <p>14     Q Okay. What is your support for these five 15 factors?</p> <p>16     A All of the other information that is 17 contained in this report. In terms of factual 18 background, I would invite your attention to Section 3 19 of the report, which starts on page 2 and goes through 20 page 13. So pages 2 through 13 involve factual 21 background that I am referring to in this report.</p> <p>22     I also, in addition, did my own calculation 23 in this Section B, which is why I referred you to that 24 because this particular list happens to be within that 25 conclusion B, as in boy.</p>
<p style="text-align: right;">Page 107</p> <p>1     is not less valuable because the union was not 2 clairvoyant about a move that was going to happen ten 3 years later. I would not expect anyone to have such 4 clairvoyance, and I would not modify the price based 5 upon not being able to tell the future. None of the 6 transactions that I value involve telling the future.</p> <p>7 BY MS. McCONNELL:</p> <p>8     Q So let's try an easier hypothetical because 9 in yours you conflated session data with membership 10 data, which are actually two different things, but we 11 can put that aside.</p> <p>12     So using your example of the charity that's 13 selling its mailing list, that's an easier one, let's 14 say the mailing list is completely wrong, all of the 15 homes on that list have been demolished in a 16 hurricane. They don't exist anymore. The addresses 17 are no good. Wouldn't you agree that the value of 18 that mailing list is substantially less than before 19 the hurricane?</p> <p>20     A I would invite your attention to page 19 of 21 my report in which -- at which point I describe 22 attributes of data and how that data could be worth 23 more or less depending on the data itself.</p> <p>24     Q So one of -- your number one is accuracy, 25 right?</p>	<p style="text-align: right;">Page 109</p> <p>1     Q How does Table 1, "Royalties received by the 2 Fund," on page 6, support your conclusion that the 3 information received by the Fund is accurate and 4 reliable?</p> <p>5     A Oh, I'm not suggesting that that particular 6 table relates to that particular subsection of that 7 paragraph.</p> <p>8     Q Okay. Well, that's what I asked you. I 9 said, what is your factual report for accuracy and 10 reliability, and you directed me to pages 2 through 12 11 of what --</p> <p>12     A And that was -- and that was a proper 13 response. Now, if you want to go through it on a 14 sentence-by-sentence basis, we can do that if -- if 15 that's important to you. I'm -- I'd be surprised, but 16 I was trying to give you a -- a prompt and quick 17 answer.</p> <p>18     Q Yeah, I'm just trying to use common sense. 19 And so I'm asking you how Table 1 applies to your 20 conclusion that the data is accurate and reliable, and 21 I don't think it does, based on my common sense. But 22 if you disagree with me, let me know.</p> <p>23     A Okay. I'm not going to argue with you. I 24 realize you just threw down the gauntlet and said, I 25 don't have common sense, but you do have common sense.</p>

<p style="text-align: right;">Page 110</p> <p>1 and that my answers weren't any good and that they 2 were silly and -- I'm not going to argue about that. 3 So what is your next question?</p> <p>4 Q Okay. This will be good.</p> <p>5 Let's look at section -- Section D, which is 6 on page 8. Heading is "The Union's involvement in 7 sound recordings."</p> <p>8 Are you there?</p> <p>9 A Yes, ma'am.</p> <p>10 Q Okay. You say, "The major record labels are 11 all signatories to the unions' collective bargaining 12 agreements and report record information regarding 13 both union and nonunion performers who performed at 14 such recording sessions. The following chart shows 15 the three largest record labels (Sony Music 16 Entertainment, Warner MUSIC Group and Universal Music 17 Group) who together have around a two-thirds market 18 share."</p> <p>19 The footnote here 6 takes us to this 20 statista.com article, which is behind a paywall; is 21 that right?</p> <p>22 A It is.</p> <p>23 Q Were you able to actually access the data 24 that was behind the paywall?</p> <p>25 A If I needed to, certainly.</p>	<p style="text-align: right;">Page 112</p> <p>1 that matter and because of her work history she's 2 aware of that. And she and I -- she indicated that, 3 and -- and I -- it was consistent with what I would 4 have expected.</p> <p>5 Q Okay. So she told you that the approximate 6 one-third market share of labels are also signatories 7 to the unions' collective bargaining agreements?</p> <p>8 A Wait, wait. Hold on. That's --</p> <p>9 MR. THOMAS: Objection; misstates the 10 testimony and the document.</p> <p>11 THE WITNESS: Yeah, that -- that misstates 12 what I just told you. It misstates this document.</p> <p>13 And so, no, she did not tell me that.</p> <p>14 BY MS. McCONNELL:</p> <p>15 Q Okay. So the document says, "Because some of 16 the other labels (the remaining approximate one-third 17 market share) also are signatories to the unions' 18 collective bargaining agreement, it is clear that the 19 unions' data is more complete than any other source."</p> <p>20 And I'm asking you, which portion of the 21 remaining one-third market share are signatories to 22 the unions' collective bargaining agreements?</p> <p>23 A I have not accumulated that.</p> <p>24 Q Okay. So what is it that Ms. Taub told you 25 that made you confident enough to include this in your</p>
<p style="text-align: right;">Page 111</p> <p>1 Q Did you?</p> <p>2 A No, I didn't need to here.</p> <p>3 Q Okay. What -- as used in the description in 4 the quote that you have here, what does market share 5 mean? Market share of what?</p> <p>6 A It's the same information that's being 7 reported here by this third party. It deals with 8 music publishing in the United States.</p> <p>9 Q So it's referring to the market share of all 10 songs published in the United States?</p> <p>11 A According to this third party, yes.</p> <p>12 Q You note that, "Because some of the other 13 labels (the remaining approximate one-third market 14 share) are signatories to the unions' collective 15 bargaining agreement, it is clear that the unions' 16 data is more complete than any other source."</p> <p>17 Can you name some of the other labels that 18 are union signatories that belong to that one-third?</p> <p>19 A Well, I've not endeavored to do that. Could 20 I, I suppose I could, sure.</p> <p>21 Q How do you know that they are signatories to 22 the unions' collective bargaining agreements?</p> <p>23 A Well, the unions endeavor to become -- to get 24 as many signatories to their collective agreements as 25 possible. I did speak specifically with Ms. Taub on</p>	<p style="text-align: right;">Page 113</p> <p>1 report?</p> <p>2 A Okay. I'm -- I'm trying to understand where 3 you're coming from. And the best I can come up with 4 is that the quarrel with that sentence is that I 5 should have repeated the word "some" a second time in 6 the sentence and that having failed to do so, there's 7 been some terrible wrong that's occurred. And I'll 8 apologize for that.</p> <p>9 I am not suggesting that one hundred percent 10 of the remaining third are union signatories. I'm 11 suggesting that some amount, more than zero, would be. 12 I do not know how large that amount is; however, my 13 starting point is two-thirds. So even if my -- the 14 remaining one-third was zero, which is really what 15 this sentence is saying, the remaining one-third is 16 going to have some, some, not all, some, you're going 17 to increase the two-thirds.</p> <p>18 But even if you don't increase the starting 19 point of two-thirds, it is clear that the unions' data 20 is more complete than any other source. And I don't 21 know what the problem with that is other than 22 quarreling with the fact that I probably should have 23 repeated the word "some" in that sentence.</p> <p>24 Q Let's talk about the two-thirds, then.</p> <p>25 Are you aware that Sony Music, Warner Music</p>

1 and Universal Music are record companies that are made  
2 up of several hundred smaller labels?

3 A I am.

4 Q Okay. I'm going to list a few record labels  
5 that are part of those larger distributors, and I want  
6 you to tell me if you know if they're a signatory to  
7 the union collective bargaining agreements or not,  
8 okay.

9 What about Interscope Records, are they a  
10 signatory?

11 A I have not studied each of the labels within  
12 those groups. I highly suspect that Interscope is.  
13 However, I -- I -- I'm not providing testimony  
14 regarding the level of detail that you're providing.  
15 That is not in the report and does not need to be in  
16 the report.

17 Q Do you know what percentage or what fraction  
18 of the two-thirds market share labels are union  
19 signatories?

20 A I'm suggesting that they probably -- probably  
21 the vast majority are, but in any event, you could get  
22 to the two-thirds through other data that is contained  
23 in this report. So even if this paragraph wasn't  
24 here, it would not really change anything that's here  
25 because we've got other information that is being used

1 majority." Well, hold on. Maybe I didn't -- maybe I  
2 probably misunderstood your question. Would someone  
3 like to repeat the question?

4 Q I can -- I can take out "vast majority" if  
5 you like, I can say.

6 Do you agree, then, that the unions don't  
7 have information for 76 percent of nonmembers?

8 A No.

9 Q Why not?

10 A That -- that would clearly be a poor  
11 interpretation of Table 5.

12 Q Okay. Why?

13 A Well, because you can see that even for the  
14 union members there's certain members that you can't  
15 send information out. So this could be, for example,  
16 a situation of moving and -- and keeping up with  
17 contacts.

18 But in any event, if -- if -- look, I'll try  
19 to help you along. I'm not trying to be quarrelsome  
20 in terms of characterizing it.

21 It is clear that the unions have better data  
22 on the union members than the nonunion members. The  
23 unions have some information regarding the nonunion  
24 members, but the quality or the completeness of the  
25 information for nonunion members diminishes when

1 for the only time when this information becomes  
2 relevant in the report.

3 Q And by that I think you're also referring to  
4 Table 5; is that correct, on page 9?

5 A Table 5 would be one spot, yes. I'm -- I'm  
6 not saying it's the only spot, but we have information  
7 regarding union and nonunion elsewhere.

8 Q If we look at Table 5 -- I just want to  
9 confirm that I understand the chart -- are you saying  
10 that 24 percent of nonunion members' checks are cashed  
11 as opposed to 67 percent of union members?

12 A That is the data that's been provided to me  
13 as well as to you.

14 Q Okay. Do you know why it is that the  
15 nonunion members' cashed number is much lower than the  
16 union members' cashed number?

17 A Yes.

18 Q Why?

19 A Because of the challenge in finding contact  
20 information and other information necessary before one  
21 can lawfully cut a check in the United States.

22 Q Do you agree, then, what the unions don't  
23 have that information for the vast majority of  
24 nonmembers?

25 A Well, I'm not sure how you get to "the vast

1 you're dealing with nonunion members and the starting  
2 point being the union databases.

3 I don't know that there's any quarrel about  
4 that.

5 MS. McCONNELL: Okay. Why don't we take a  
6 break and come back. Do you want to take a lunch  
7 break or do you want to go for a little bit longer?

8 THE REPORTER: Do you want to go off the  
9 record to discuss that?

10 THE VIDEOGRAPHER: We are now going off the  
11 record, and the time is 12:05 p.m.

12 (Lunch recess.)

13 THE VIDEOGRAPHER: We are now going back on  
14 the record, and the time is 12:44 p.m.

15 BY MS. McCONNELL:

16 Q Okay. Mr. Nolte, did you devise the -- did  
17 you devise the 50-song study?

18 MR. THOMAS: Objection; vague.

19 THE WITNESS: I don't know what you mean by  
20 "devise."

21 BY MS. McCONNELL:

22 Q Did you set the parameters of the 50-song  
23 study?

24 A By parameters, what I have in mind is the  
25 sample size of 50. Is that what you're asking about?

<p>Page 118</p> <p>1 Q We can start there.    2 A I did not set the sample size of 50.    3 Q Okay. Did you provide any input on any other    4 starting points for the study, including what -- what    5 general group of titles to pull the 50 songs from?    6 A No.    7 Q Okay.    8 A Well, and the no -- well, hold on a minute.    9 Your -- your question was compound. So the part that    10 I was answering was the last half of your question,    11 not the first half. So I -- let me say the same thing    12 a different way.    13 I was not involved with the sample selection.    14 That would be a more precise way of answering what I    15 was intending just a second ago.    16 Q How -- generally speaking, how would you    17 design a statistical study?    18 A How would I?    19 Q Yes.    20 MR. THOMAS: Objection; overbroad, vague,    21 outside the scope.    22 THE WITNESS: If -- and -- and the sentence    23 starts with "if," so you may not need to do this, but    24 if one decided that they needed to follow the rules of    25 inferential statistics, then one would need to have a</p>	<p>Page 120</p> <p>1 Q Okay. What are the consequences of having a    2 poor sample selection?    3 A Well, I don't know what "poor" is so I -- so    4 I'm afraid I can't answer the question without knowing    5 what "poor" is. I could substitute my own definition    6 of "poor," but I don't know what you have in mind.    7 Q What are the consequences of having a not    8 statistically significant sample selection?    9 A Then you cannot draw statistical inferences    10 expressed in terms of precisions and confidence    11 levels.    12 Q What are the consequences of having a sample    13 that is not representative of the whole?    14 A Well, then -- then you would have what's    15 commonly called a sample error and so the    16 conclusions -- which, by the way, can happen even if    17 you got a statistically valid sample. In other words,    18 you follow the rules you -- you could have a sample    19 error, and the -- the effect of having a sample error    20 is that your conclusions expressed in terms of    21 inferential statistics are incorrect.    22 Q In your opinion, is it important for a sample    23 to be representative of the larger dataset from which    24 it's drawn?    25 A Yes.</p>
<p>Page 119</p> <p>1 random sample and the sample size of that random    2 sample would be a function of the confidence level,    3 the precision intervals, and the variance within the    4 population. And that would mathematically tell you    5 what the sample size needed to be so that you could    6 express conclusions using the science of inferential    7 statistics.</p> <p>8 BY MS. McCONNELL:</p> <p>9 Q Is it correct that when you first set out to    10 do a statistical study you need to identify a    11 hypothesis?</p> <p>12 A Okay. I mean, yeah, you need to know what    13 you're testing, otherwise -- you're right, I mean,    14 I'm -- I'm presuming that that's understood.</p> <p>15 Q Okay. Do you collect data and identify a    16 sample subset?</p> <p>17 A You do use a sample which I think you're    18 calling a sample subset. So sure, a sample is a    19 subset of the entire population.</p> <p>20 Q What are the principles of sample selection?</p> <p>21 A Perhaps I haven't -- well, I probably don't    22 understand your question. But I -- but I would refer    23 you to the earlier answer I gave you in terms of how    24 one would go about designing a -- a test if you wanted    25 to follow inferential statistic requirements.</p>	<p>Page 121</p> <p>1 Q And is it important, in your opinion, to    2 obtain a random sample?</p> <p>3 A A random sample is a requirement of -- of --    4 of any -- following any of the requirements of    5 inferential statistics. So if you're going to express    6 your conclusions in a manner consistent with    7 inferential statistics the sample must be randomly    8 selected.</p> <p>9 Q Is it possible to have a sample that is    10 representative if it is not random?</p> <p>11 A Yes.</p> <p>12 Q How? How is it possible?</p> <p>13 A How?</p> <p>14 Q Uh-huh.</p> <p>15 A Okay. Well, I'm -- I'm looking at my screen    16 and in my screen I got four people and then a whole    17 bunch of people that aren't shown. But you're shown.    18 Mr. Thomas is shown. The reporter is shown. And I'm    19 shown. There's nothing random about those four    20 observations.</p> <p>21 And by the way, it's also a pretty small    22 sample size. It's only four. Nevertheless, there are    23 two women and two men. And so if we were to look at    24 this sample of -- nonrandom sample of four people and    25 say, hey, what do you think the population of men</p>

Page 122	Page 124
<p>1 versus women are in the world, I'd say -- looking at 2 this, I'd say, well, it looks like 50/50.</p> <p>3 Now, there's nothing random about it.</p> <p>4 There's nothing proper about the sample size, but I 5 arrived at an absolutely correct answer. And that's 6 an example that I just did off the top of my head that 7 illustrates what you were asking.</p> <p>8 Q So is it just by luck, then, that it's 9 representative if it's not random?</p> <p>10 A No. No. It might be -- my example was 11 probably luck. But when you look at the manner that 12 this -- the 50-title item was -- was selected, I would 13 not say it was luck. I would say -- well, I would not 14 attribute it to luck.</p>	<p>1 I -- you know, we were quarreling about, you know, my 2 luck example with the four people that are on my 3 screen. But let's say instead I say let's do a test.</p> <p>4 We want to figure out how many fingers each 5 human has. And so I say, okay, everyone put up their 6 fingers and we'll count them and I haven't seen your 7 fingers yet so I don't know what the answers are, but 8 I can tell you I have ten fingers and I'm willing to 9 wager that the other three people I was describing 10 have ten fingers. So then I've got four observations 11 of ten fingers. And I would say, well, based on that, 12 I will extrapolate that humans have ten fingers.</p> <p>13 Now, there's nothing following inferential 14 statistics, but I don't think anybody is going to 15 doubt the conclusion that humans have ten fingers.</p> <p>16 And that's an example of what -- how you could do that 17 without using inferential statistics.</p>
<p>15 Q Okay. Generally speaking, is it accurate to 16 say that sample selection is important to ensure that 17 data is usable for the intended purpose?</p> <p>18 A If you're going to want to express your 19 conclusions inferentially, then, yes. I -- I have not 20 drawn any conclusions using the tools of inferential 21 statistics so in that sense the answer would be no. 22 I'm not quarreling with the fact that someone might 23 have done a sample in a different way, but that does 24 not mean that what you proposed a second ago is 25 correct.</p>	<p>18 Q Who devised the 50-song study?</p> <p>19 A You said who devised it?</p> <p>20 Q I did.</p> <p>21 A That assumes that there was a single person 22 that devised it so I -- I -- the Fund was certainly 23 involved in coming up with that, and I'm sure they 24 would say I had some input.</p> <p>25 Q What input did you have?</p>
<p>Page 123</p> <p>1 Q You're talking specifically about the 50-song 2 sample again, I'm assuming. But if you're saying that 3 you didn't use inferential statistics to come to your 4 conclusions how are you confident that the 50-song 5 sample is representative?</p> <p>6 A I've not -- I've not reached any conclusion 7 regarding it being representative. The Fund made the 8 sample. The Fund indicated that in their mind it was 9 random and in their mind it was sufficiently large to 10 accomplish its purpose. And so I did my work with the 11 results of that sample.</p> <p>12 Q Are you able to extrapolate results on the 13 larger track list based on the 50-song sample?</p> <p>14 A One can extrapolate it. You will lose the 15 opportunity to do so with the precision and confidence 16 parameter. So I've -- I've not expressed anything 17 with the precision and confidence level because of 18 what you just mentioned. But, yeah, you certainly can 19 extrapolate it, yes. You -- you don't need -- you 20 don't need to use inferential statistics to do an 21 extrapolation.</p> <p>22 Q Why not?</p> <p>23 A It's definitionally you don't. I mean, look, 24 look, look, look. Let me give you an example.</p> <p>25 Let's say we go back -- and this is not luck.</p>	<p>Page 125</p> <p>1 A I had a conversation with Jenner &amp; Block and 2 Fund representatives about what information the Fund 3 had regarding what happens when they don't use the 4 union data. And they -- this is my characterization. 5 I'm not trying to put words in anyone's mouth. 6 But the impression I got back was, golly, 7 that's an awful stupid question, why would we ever 8 waste our time trying to figure out the impact of data 9 that we know to be valuable and that we use every day 10 of the week.</p> <p>11 I said, well, because -- and I answered and 12 said, well, that's because that's what the plaintiff 13 thinks you should be doing. They think either the 14 union should be giving away the data for free or you 15 should not be using it. And those are the two options 16 that I think the -- the plaintiff is proposing.</p> <p>17 And my question is, have you ever really 18 contemplated that, that as a possibility, and they 19 said, no, we just told you that was a stupid question.</p> <p>20 I said, well, okay, but that's the stupid question 21 that the plaintiffs are asking so maybe we should try 22 to answer their question.</p> <p>23 And so they went off and did the 50-sample 24 test and it was -- I suspect I was the cause of it 25 initially, although they are the ones that -- that</p>

<p style="text-align: right;">Page 126</p> <p>1 initially did the sample and -- and did the work    2 because that's of course what they do for a living.    3 And then they gave it back to me and I did the work    4 that's reported in my report.    5 So when you say who devised it, I did some of    6 the calculations at the end. And -- and I think I was    7 probably the guy who caused the thing to come up to    8 begin with and they were the ones that implemented the    9 research because they of course have the researchers    10 on staff and I don't research this and couldn't do it    11 near as fast as they can.</p> <p>12 Q You are aware that there's several instances    13 where the unions don't have session reports for tracks    14 and the Fund needs to do all the research by    15 themselves, right?</p> <p>16 A I think what you're asking me is, is it true    17 that the 100 percent of the nonfeatured performers are    18 not covered by session reports and -- I think that's    19 what you're asking me. And I think everybody's    20 acknowledged that that's the case.</p> <p>21 Q Okay. I don't need to know that it's true.    22 I don't need you to answer whether it's true or not    23 because I know that it's true.</p> <p>24 So my question to you is, were you aware of    25 the fact that the unions don't have session reports</p>	<p style="text-align: right;">Page 128</p> <p>1 If you were going to create an inferential    2 statistics study of these songs, how would you go    3 about doing that?</p> <p>4 A I would do the things that I described in    5 response to the very first question on this line of    6 questioning where I described inferential statistics    7 and how one goes about it.</p> <p>8 Q Would you look to a single year or multiple    9 years?</p> <p>10 A I have to give that some thought. What --    11 you probably -- there's more than one acceptable way    12 of doing that. You could, for example, look at    13 payments in a -- in a particular year and then for    14 purposes of reporting errors, go back and look at    15 life-to-death information. And there'd be nothing    16 improper about that.</p> <p>17 You -- you could also look at a database that    18 has everything from the beginning of time and use that    19 as your starting point. So I'm not sure it's an    20 either/or situation. The question is whether whatever    21 group you're using from which you select your samples,    22 is that representative of the problem you're trying to    23 solve.</p> <p>24 Q Would it be more accurate to look at a    25 sampling of songs over multiple years?</p>
<p style="text-align: right;">Page 127</p> <p>1 for all the nonfeatured performers that the Fund needs    2 to pay?</p> <p>3 A I'm sure it's in my report somewhere if --    4 if -- that -- that's a basic starting point for much    5 of this dispute. So I -- I'm sure I could find    6 something in the report that says just that. But,    7 yes, I'm -- I was aware of that.</p> <p>8 Q Were you consulted at all in the methodology    9 of the study?</p> <p>10 A Well, I was not consulted on how to research.    11 The folks at the Fund are very confident they know how    12 to research, and they did not ask me any questions    13 about how to research.</p> <p>14 Q If you were going to create an ideal    15 inferential statistic study of these songs, how would    16 you go about doing that?</p> <p>17 MR. THOMAS: Object to the form.</p> <p>18 THE WITNESS: Well, you said "ideal." The    19 whole point of inferential statistics is to not do    20 something ideal. That's the -- so when you say ideal    21 inferential statistics, it's kind of like, well --</p> <p>22 BY MS. McCONNELL:</p> <p>23 Q Okay. Let me try it again.</p> <p>24 A We're not communicating.</p> <p>25 Q Thank you.</p>	<p style="text-align: right;">Page 129</p> <p>1 A Not necessarily. It depends what you were    2 trying to solve. So let's say, for example, that what    3 you were saying, as -- as the plaintiff has said,    4 that, well, on a going-forward basis this -- this past    5 information is not as important as it used to be, so    6 we -- we think that it's more important to look at it    7 on a going-forward basis. And plaintiff has certainly    8 said that. Then if that were the case, then there'd    9 be reason to look at more recent data in making your    10 sample.</p> <p>11 Q Can you think of any advantages to using only    12 one year of data?</p> <p>13 A I just gave you an advantage.</p> <p>14 Q You talked about --</p> <p>15 A So I guess the answer's, yes, I just answered    16 that question.</p> <p>17 Q Weren't you answering the question based on    18 recent years. I said how about one year.</p> <p>19 A Okay. You can substitute one year for recent    20 years.</p> <p>21 Q Okay. Footnote 12 on page 11 of your report,    22 you write, "The Fund's selection process started with    23 a list of 5,992 titles that had distributions in 2020    24 and had Union session reports. Starting approximately    25 halfway through this list, the largest fifty of the</p>

<p style="text-align: right;">Page 130</p> <p>1 next one hundred sequential titles were selected."</p> <p>2 So to start from, the Fund started with a</p> <p>3 list of tracks that all had session reports from the</p> <p>4 unions, right?</p> <p>5 A That's what it says.</p> <p>6 Q Do you know what the total amount of tracks</p> <p>7 in the pool was that was whittled down to the 5,992?</p> <p>8 A I -- I'm -- I don't understand your question.</p> <p>9 If you're saying that if you went to the beginning of</p> <p>10 time would you get a larger collection, the answer is</p> <p>11 most certainly.</p> <p>12 Q Thank you.</p> <p>13 Do you know what that number is?</p> <p>14 A No.</p> <p>15 Q Okay.</p> <p>16 A Although you could probably infer it. But</p> <p>17 the answer is, no, I don't know.</p> <p>18 Q Okay. Is it the 136,000 number that was in</p> <p>19 that interrogatory response that we looked at earlier?</p> <p>20 A It could be. That -- I mean, those --</p> <p>21 those -- those are titles and, similarly, the titles</p> <p>22 in footnote 12 are -- they're both expressed in terms</p> <p>23 of titles.</p> <p>24 Q Why didn't the Fund use the entire pool of</p> <p>25 titles to determine which tracks were researched using</p>	<p style="text-align: right;">Page 132</p> <p>1 Q Okay. So what was done, then, by the Fund?</p> <p>2 A The Fund did what this footnote 12 says.</p> <p>3 Q Okay. How was the list of 5,992 songs</p> <p>4 ordered?</p> <p>5 A My understanding, and it's not written here</p> <p>6 so I -- my recollection could be wrong, but my</p> <p>7 understanding is that it was ordered by size so that</p> <p>8 the biggest item was first and the smallest item was</p> <p>9 second and so from the vantage point of the person</p> <p>10 that was doing this, they wanted songs that were kind</p> <p>11 of typical. And typical meant halfway in the middle.</p> <p>12 And so that's how whoever decided to do this did that.</p> <p>13 Q So what do you mean when you say "size"?</p> <p>14 Size, the number of performers?</p> <p>15 A In other words, the -- the titles with the</p> <p>16 largest -- they were ordered -- the titles were</p> <p>17 ordered by dollar amounts of -- of -- hold on, I'm</p> <p>18 sorry, there's something happening here that -- I'm</p> <p>19 sorry, excuse me.</p> <p>20 THE WITNESS: I -- I apologize but there's a</p> <p>21 problem that just arose. Can we take even just a</p> <p>22 minute?</p> <p>23 MS. McCONNELL: Sure. We'll just wait here.</p> <p>24 THE WITNESS: Yeah, I -- my apologies. This</p> <p>25 is not --</p>
<p style="text-align: right;">Page 131</p> <p>1 union data as opposed to other sources?</p> <p>2 A I'm sorry, someone's going to need to reread</p> <p>3 that question. Or let me give you a better answer. I</p> <p>4 can give you an answer.</p> <p>5 You're asking me some -- about someone else's</p> <p>6 state of mind, as I understand this question, so upon</p> <p>7 reflection, even though I do not understand your</p> <p>8 question and would need to have it reread, the answer</p> <p>9 to the question, what is the Fund's state of mind, is,</p> <p>10 I don't know because I'm not the Fund.</p> <p>11 Q Well, you were consulted to do the sample,</p> <p>12 weren't you?</p> <p>13 A Yes, as I described before.</p> <p>14 Q Right. Okay. So I'm asking you why didn't</p> <p>15 you use the entire pool of songs distributed in 2020</p> <p>16 as opposed to whittling it down to 5,992 before then</p> <p>17 doing another sample of just 50?</p> <p>18 A Well, first of all, I don't think your</p> <p>19 question summarizes accurately what was done, but --</p> <p>20 but the answer, ultimately, to your question is, you</p> <p>21 said why didn't you, and "you" I think refers to David</p> <p>22 Nolte. So why didn't David Nolte do -- and then fill</p> <p>23 in whatever your question.</p> <p>24 And the answer is, David Nolte didn't do that</p> <p>25 so you're asking the wrong fellow.</p>	<p style="text-align: right;">Page 133</p> <p>1 THE VIDEOGRAPHER: Should we go off the</p> <p>2 record, Counsel?</p> <p>3 MS. McCONNELL: Sure.</p> <p>4 THE VIDEOGRAPHER: We are now going off the</p> <p>5 record, and the time is 1:06 p.m.</p> <p>6 (Recess.)</p> <p>7 THE VIDEOGRAPHER: We are now going back on</p> <p>8 the record, and the time is 1:08 p.m.</p> <p>9 BY MS. McCONNELL:</p> <p>10 Q Okay. Before we took our break, I asked you</p> <p>11 what did you mean when you said size, and then I don't</p> <p>12 think you had finished your answer.</p> <p>13 A Okay. My understanding is that the Fund</p> <p>14 obtained a -- a printout by title that was ordered by</p> <p>15 royalties to be distributed to nonfeatured performers.</p> <p>16 So that the largest title obtaining -- was listed</p> <p>17 first. I say largest, the largest in terms of the</p> <p>18 dollars to be distributed was first, and the smallest</p> <p>19 to be distributed was last.</p> <p>20 I -- I don't actually have that report, but</p> <p>21 that was my understanding of what was being described.</p> <p>22 And so the folks who made the sample wanted something</p> <p>23 that was typical and so they went roughly to the</p> <p>24 middle of the list.</p> <p>25 Q Was it your suggestion to order the list</p>

1 based on size?  
 2 A I made no such suggestion.  
 3 Q Okay. And I think I might have asked you  
 4 this. Forgive me.  
 5 Do you know what fraction of the whole 5,992  
 6 songs represent?  
 7 MR. THOMAS: Objection to the form.  
 8 THE WITNESS: Well, my understanding is that  
 9 the whole is the 5,992, so, in other words, they --  
 10 for whatever parameters that were identified they said  
 11 give us all of these. And that's what the starting  
 12 point of the list was. So perhaps I don't understand  
 13 your question.  
 14 BY MS. McCONNELL:  
 15 Q Yeah. Isn't the whole the total number of  
 16 tracks that were distributed on in 2020?  
 17 A I -- I understood this to be a recent year.  
 18 It was probably 2020, but I -- I couldn't even tell  
 19 you that.  
 20 Q Okay. Isn't the whole the total number of  
 21 tracks that were distributed on in the year that they  
 22 were using?  
 23 A Where they had unions reports, yes. They --  
 24 they were -- see, the -- the whole idea was to figure  
 25 out what would happen with and without union session

1 not accused anybody of lying and so when they said  
 2 that the -- they took everything that met their --  
 3 their sample parameters, I did not require that I --  
 4 I -- I start from scratch.  
 5 BY MS. McCONNELL:  
 6 Q Honestly, I don't know what you're even  
 7 referring to about lying because I said nothing about  
 8 lying and I'm -- and now you're saying, "I did not  
 9 require that I start from scratch." So are you saying  
 10 now that you did a different sample than the Fund?  
 11 What do you mean when you're saying, "I did not  
 12 require that I start from scratch"?  
 13 A I'm sorry if I misunderstood your question.  
 14 But I understood your question to say there's 6,000  
 15 that they -- the Fund used but the real number's not  
 16 6,000, the real number is whatever -- and then I said,  
 17 well, okay, I don't know where these new numbers come  
 18 from, but if someone's lying and there really wasn't  
 19 6,000, then under your hypothetical question that the  
 20 real number is more than twice what the Fund  
 21 representatives told me, then they must be lying.  
 22 Q No.  
 23 A I didn't -- you're right, I didn't make that  
 24 assumption. I didn't test it and -- and I didn't  
 25 catch them in a lie, if that's what you're accusing

1 reports. So given that definition of the problem, you  
 2 had to further limit it to -- to titles with -- with  
 3 session reports.  
 4 Q Are you able to assume that the 5,992 songs  
 5 were representative of the total songs distributed in  
 6 that year?  
 7 A Are you asking me am I able to make that  
 8 assumption?  
 9 Q Yes.  
 10 A I make no assumptions.  
 11 Q To determine what would happen with or  
 12 without union session reports, would it matter if the  
 13 5,992 is out of 10,000 tracks versus 30,000 tracks?  
 14 MR. THOMAS: Objection; vague.  
 15 THE WITNESS: I -- I maybe don't understand  
 16 your question. But here -- here's what I think you're  
 17 asking me.  
 18 The Fund reports roughly 6,000. It's 8 shy  
 19 of 6,000. So there's 6,000 titles. And you're  
 20 saying, no, they're liars, it really wasn't 6,000, it  
 21 should have been some other number but I don't -- you  
 22 gave two numbers in your question.  
 23 If the Fund folks who were doing this are  
 24 lying, well, then, I would not condone lying, and then  
 25 I would -- I'd want to know more about it. But I've

1 them of.  
 2 Q Yeah, we're obviously talking past each  
 3 other. That's okay.  
 4 Is the utility of this sample data to  
 5 determine what would happen with or without session  
 6 reports?  
 7 A That is what's being tested, yes.  
 8 Q Okay. So in order -- and was it the point to  
 9 extrapolate from this sample how it would work for the  
 10 entire track list of songs in a given year?  
 11 A Yes, there's an extrapolation being done.  
 12 Q Okay. So isn't it important, then, to know  
 13 how many songs were distributed in that given year?  
 14 A No, because it's being expressed as a  
 15 percentage. So if it's being expressed as a  
 16 percentage you could apply, or extrapolate, to use the  
 17 word you were using, the percentage to a larger group  
 18 and it's still -- the percentage doesn't change.  
 19 Q Okay. So what percentage of the total group  
 20 is 5,992?  
 21 A 100 percent of whatever they were selecting  
 22 from.  
 23 Q Okay. But how does that answer my question?  
 24 What percentage of the total group of songs  
 25 distributed in that year is 5,992?

1 A I don't have the number. Effectively what  
2 you're asking me is, is what -- well, how many  
3 nonunion -- or -- or how many tracks do not have union  
4 session reports, and the answer is, I don't know. I  
5 could --

6 Q Okay --

7 A I could -- I could ask based on the other  
8 information that's in here, but I don't -- I don't  
9 have that precise figure that I think you're seeking.

10 Q What was the significance of starting, quote,  
11 approximately halfway down that list?

12 A That was the explanation that was provided to  
13 me. I gave you at least on two prior answers the  
14 rationale that was expressed that I understood it to  
15 be. But I wasn't the one who did that.

16 Q Then the footnote, same footnote 12, says  
17 that they used, quote, "The largest 50 of the next  
18 100." And does largest mean dollar value, dollar  
19 amount of distributions?

20 A Correct. So my -- look, and I apologize if  
21 it wasn't well expressed. But my understanding was  
22 that this starting point was some current period of  
23 distribution and the report had a year-to-date or a  
24 life-to-date amount on it. And -- and that -- that  
25 may have been a function of -- of available data in

1 included a current period, which was the -- the basis  
2 for initially looking at this, and then they had a  
3 life-to-death or origin-to-current period, or what --  
4 however they labeled it, field. And within the 100  
5 they selected another field that had the largest life  
6 to death. And that was their selection process.

7 Now, again, I wasn't doing this, and I wasn't  
8 directing it either. I was -- I was told about it  
9 after it was done.

10 Q Okay. And you don't know why the year was  
11 limited to only 2020, right?

12 A You used the word "know" and so the answer  
13 is, I -- I do not know that because I wasn't the one  
14 doing it.

15 Q Right. You were told about it after it was  
16 done?

17 A I'm sorry?

18 Q You said you were told about it after it was  
19 done, right?

20 A Correct. The -- the sample was created and  
21 the research was done and then I was told about the  
22 results.

23 Q Okay. Do you happen to know approximately  
24 how many songs in that 50-song sample were by country  
25 artists?

1 the database.  
2 I mean, frequently -- you know, we want to  
3 work in an ideal world where everything is available  
4 to us and it simply isn't. So using -- oftentimes  
5 using current periods gets you a -- a more desirable  
6 or a more accurate answer simply because of the  
7 constraints of the data.

8 But in any event, my understanding is that  
9 the report that was run included life-to-death  
10 amounts, and so they were able to pick the larger of  
11 those within the -- the sample, if you wish, the --  
12 the first sample.

13 Q Okay. So if the -- if the 5,992 was  
14 originally ordered in terms of largest to smallest, as  
15 you described, and then you go halfway down and then  
16 you pick the next 50, why does the note again say  
17 picking the largest 50 of the next 100? Wouldn't it  
18 necessarily be numbers 51 to 100 because the list was  
19 ordered by largest to smallest to begin with?

20 A Well, first of all, you really are asking the  
21 wrong person. I -- I was not doing this, and I've  
22 told you that in response to probably every single  
23 question. But I can give you my understanding.

24 My understanding is that there were the data  
25 reported in this document or file, whatever it was,

1 A So as a genre of music, country?

2 Q Yes.

3 A I could not tell you.

4 Q Do you know what percentage of overall --  
5 strike that.

6 Do you know what percentage of tracks that  
7 the Fund pays are country tracks?

8 A I could not tell you.

9 Q Okay. Do you know whether the number of  
10 country songs in the 50-song sample are under or  
11 overweighted?

12 A I have not done anything to address that.

13 I -- I know there's some that aren't country, but, you  
14 know, if you are telling me there's a  
15 disproportionately high country, I -- I haven't looked  
16 at that.

17 Q Okay. Are you aware of testimony in this  
18 case from Julie Sandell where she said that Nashville  
19 tracks skew heavily union?

20 A Yes. In fact, I may have even quoted that in  
21 my report. But she said Nashville and I believe it  
22 was Los Angeles as well are more lovely union.

23 Q She said that in her estimation 95 percent of  
24 tracks from Nashville were recorded in union sessions.  
25 Does that sound familiar?

<p>1     A I don't recall the 95 percent, but, you know, 2 if you tell me that was the number -- she -- she 3 clearly said that -- that union penetration varies by 4 location. And as I recall, she identified Nashville 5 and Los Angeles as being more heavily union than 6 others locations.</p> <p>7     Q Okay. If the sample size overrepresented 8 Nashville tracks, wouldn't it overrepresent the role 9 of union data?</p> <p>10    A Well, it's not possible to overweight the 11 union data because the whole point of the test is to 12 evaluate the impact of having the union data versus 13 not having union data. Now, if you're starting 14 without union data, then there's no point of -- 15 there's no comparison that's possible.</p> <p>16    So you absolutely are weighting or -- or 17 drawing your sample from union tracks. That is -- 18 that is a requirement of what's being tested.</p> <p>19    Q Right. Because your 5,992 titles to start 20 with are ones that have union session reports to begin 21 with, right?</p> <p>22    A They have to have union session reports, yes.</p> <p>23    MS. McCONNELL: Nico, maybe you can pull up 24 the invoice again, on the fourth invoice, task 25 number 3, please.</p>	<p>Page 142</p> <p>1 spreadsheet. And so as a result there was some things 2 that did not crossfoot. In other words, the -- the 3 sum of the columns for musicians and vocalists did not 4 foot the total. And I said, well, come on, you know, 5 what's going on here, how come they don't crossfoot. 6 And it was because of the existence of this I'll call 7 it third category of people involved that were doing 8 both. And so the spreadsheet was changed to add that 9 information and then it did -- and then it 10 crossfooted.</p> <p>11    Q Okay. So you didn't exclude those songs from 12 the sample, you just added another column?</p> <p>13    A We added another column so that we had data 14 that crossfooted. And you can see that in the -- in 15 the summary tables as well as in my Exhibit 2.</p> <p>16    Q Okay. Why you did you need to calculate an 17 error rate?</p> <p>18    A Well, I wanted to to give some context to the 19 problem that existed and -- because otherwise it 20 was -- even with a sample of 50, which I appreciate, 21 you know, maybe you say it's too small, but even with 22 50 you get kind of lost in the detail so I needed to 23 provide some summary. And I did that in my Section B, 24 as in boy, of -- of my conclusions.</p> <p>25    Q Let's start with, what is an error rate?</p>
<p>Page 143</p> <p>1     Q So on this invoice that we previously looked 2 at, this is Nolte page 4, it says, "Fund provided a 3 new version of the 50-song sample; rechecked Fulcrum's 4 analysis to ensure there were no changes to the 5 underlying data that would alter the earlier 6 conclusion."</p> <p>7     What was the new version of the 50-song 8 sample?</p> <p>9     A I'm having trouble reading. I'm just going 10 to go to a different copy so that I can read it.</p> <p>11    Q Sure.</p> <p>12    I guess better stated, is Exhibit 2 to your 13 report the new version?</p> <p>14    A Yes.</p> <p>15    Q Okay. What --</p> <p>16    A Yeah, I'm -- I'm having trouble finding the 17 bill. But, look, I -- I can probably do it without 18 looking at the bill.</p> <p>19    My -- my Exhibit 2 to my report is based on 20 the new version. You want to know what the old 21 version was; is that the question?</p> <p>22    Q Yes. What's the old version?</p> <p>23    A In the initial version, there are some 24 artists that are both instrumentalists and vocalists 25 and that did not get reflected on the original</p>	<p>Page 145</p> <p>1     A It's just what those English words would -- 2 would mean. It's a mistake or something you don't 3 want and a rate expressed as a percentage or amount.</p> <p>4     Q How do you calculate an error rate?</p> <p>5     A You could do it either as a percentage or an 6 amount.</p> <p>7     Q But I mean, how -- what process do you go 8 through to calculate either the percentage or the 9 amount?</p> <p>10    A You figure out how much it's wrong by and you 11 can compare it to a total, which is exactly what I've 12 done here.</p> <p>13    Q Okay. So an error rate of 60 percent, is 14 that high in your experience?</p> <p>15    A It's unacceptable. It's not just high. If 16 you're doing audit testing and someone says, oh, you 17 know, don't worry about that, it's only 60 percent 18 error rate, you know, that doesn't pass the straight 19 test. Look, you can't have 60 percent error rates. 20 That -- that just means you're -- it's a joke 21 and -- and so you need to do better, way better than a 22 60 percent error rate.</p> <p>23    So, yes, a 60 percent error rate is -- is 24 unacceptably high.</p> <p>25    Q Do you know what the Fund researchers were</p>

1 consulting when they limited themselves from not  
2 looking at union data?  
3 A It is recorded in the detail spreadsheets. I  
4 give you references to that in my report. But if you  
5 wanted to see it -- that's why I gave you the  
6 references. So you could actually see what they were  
7 look at.

8 Q Did you look into whether there was an error  
9 rate even when the Fund researchers were looking at  
10 union data?

11 A There were no examples of that found. That's  
12 reported in my -- in my report. So the union data was  
13 never found to be unreliable.

14 Q Okay. Do you know if the Fund researchers  
15 who were taking part in this study did anything to  
16 check to see if the union data was reliable or not?

17 A Well, the details that are contained in that  
18 spreadsheet specifically identify that so that is one  
19 of the fields that had to be completed and they did  
20 complete it. I had a conversation with Fund  
21 representatives after this was done and -- and that  
22 was again confirmed. So it's -- it was both in my  
23 conversations, but it's also contained in the written  
24 document.

25 Q Did any of the Fund researchers share with

1 useful in -- or it has information involving this  
2 amount of royalties and -- and participants.  
3 Q Did you ask the Fund to collect that database  
4 summary that's referred to in footnote 10?  
5 A I appreciate that's a simple question. It  
6 might frustrate you that I'm not giving you a  
7 yes-or-no answer.

8 The -- I had a -- multiple conversations with  
9 Fund representatives and I was seeking information  
10 regarding union versus not -- nonunion data and I was  
11 asking for information that would provide insights in  
12 that regard. In that sense I did ask for it.

13 Now, at the same time, they were responding  
14 to your discovery, written discovery, and so there was  
15 some things where people said, well, that's kind of  
16 like what the plaintiffs want for this, or, it's, oh,  
17 that's kind of like what was in the Blondell  
18 litigation and we think we can get this, that or the  
19 next thing and would that be useful. And I said,  
20 sure, go ahead and give it to me if useful to -- for  
21 whatever the issue, you know, the table has to be  
22 produced.

23 So I did ask for this data but it doesn't  
24 necessarily make that my idea. It could have been  
25 your idea through written discovery. It could have

1 you that in the total pool of tracks there are errors  
2 that are made even when using union data?  
3 A I -- look, I highlighted in a footnote that,  
4 you know, no data source is infallible. And that  
5 infallibility -- something does not have to be  
6 infallible to be valuable. So I don't doubt for a  
7 minute that in any information gathering process that  
8 a mistake is made. This is still done by humans. Can  
9 it be done by computers, computers can make mistakes  
10 because the programs can make mistakes.

11 But -- so it's -- but, no, no one has told me  
12 that the union data is unreliable or should not be  
13 used or had any meaningful error rate to them.

14 Q On page 10 of your report, Table 6, you have  
15 heading -- well, most of your headings in this chart  
16 have some variation of "supported by union data" or  
17 "not supported by union data."

18 As used here, what does "supported by union  
19 data" mean?

20 A It means I'm summarizing the information  
21 that's on a production number that is in footnote 10.  
22 So whatever is intended by that document is what I'm  
23 intending.

24 My understanding is that it's just what those  
25 English words are saying, that the union data is

1 been the -- the idea of the Blondell litigation or it  
2 could have been the idea of someone else on the board  
3 or whatever that thought they wanted this information.  
4 I was -- basically I was asking a bunch of questions  
5 and the Fund was giving back to me the information  
6 that they thought they had that was reliable.  
7 Q Okay. So you don't know one way or another  
8 if this spreadsheet was created because you asked the  
9 question or not?

10 A Well, they may have assembled it for that --  
11 the short answer is, I don't know. I -- I got these  
12 pieces of information, they were produced with  
13 production numbers on them and I've reported them  
14 here.

15 Q Okay.

16 A I'm not telling you I had nothing to do with  
17 it, but I also don't want to claim credit that it was  
18 my idea or -- or my invention.

19 Q We didn't get it until it was produced with  
20 your report which is why I'm asking you these  
21 questions. I'm really not trying to trick you. I'm  
22 just trying to figure out why it wasn't produced to us  
23 in discovery beforehand. But that's okay.

24 A Well, it -- maybe I'm -- maybe I deserve more  
25 credit than -- than I'm giving myself. I don't know.

<p style="text-align: right;">Page 150</p> <p>1 I'm just telling you that the -- the information      2 gathering was an evolving process and I got the      3 information that's summarized in this section of my      4 report.</p> <p>5 Q Do you know if -- well, strike that.</p> <p>6 You mentioned the Fund's AS400 system. Do      7 you know how the AS400 system tracks whether or not a      8 participant allocation is supported by union data or      9 not?</p> <p>10 A I understand there's a field in that database      11 that exists but is not reliable. And -- and...</p> <p>12 Q Yeah.</p> <p>13 A So I mean, I -- I know there's been      14 discussion on that topic. But generally I'm not      15 familiar with the detailed workings of that database.</p> <p>16 Q Okay. And I think that testimony was from      17 Ms. Taub's 30(b)(6) deposition where she said that the      18 AS400 system does have that field but it's not      19 reliable. Is that what you were referring to?</p> <p>20 A She certainly told me the same thing outside      21 of the deposition.</p> <p>22 Q Okay. If the report was made, if -- if the      23 report that's attached -- strike that.</p> <p>24 If the report that's referenced in      25 footnote 10 is created from unreliable data, doesn't</p>	<p style="text-align: right;">Page 152</p> <p>1 know the distinction between this document with the      2 production number and this other field.</p> <p>3 But I -- I do know that the error, the piece      4 of the data that was unreliable was that the union      5 data was significantly underreported. And so -- which      6 means that the two bolded numbers on Table 6, assuming      7 we're even starting with the same thing, are similarly      8 underreported.</p> <p>9 Q When it says "union data," are you talking      10 about session report data, contact information or      11 both?</p> <p>12 A I'm talking about what's -- what is on this      13 production number. It -- it's a piece of information      14 that the Fund gave me.</p> <p>15 Q Yeah, again, this is the first time we got      16 this production number, is through you, so I have no      17 one else to ask these questions of, unfortunately, but      18 you.</p> <p>19 So do you know one way or another whether the      20 spreadsheet that was DEFS42028 is including      21 information from B-form session reports, contact info      22 or both?</p> <p>23 A I couldn't tell you.</p> <p>24 Q Okay. On page 13 of your report -- okay.      25 If you look at, I'm sorry, page 14 under A,</p>
<p style="text-align: right;">Page 151</p> <p>1 that make your Table Number 6 unreliable?</p> <p>2 A Given -- given your "if" statement, sure.</p> <p>3 You're -- you basically said if -- if -- if Table 6 is      4 unreliable, isn't Table 6 unreliable? The answer is,      5 sure, it is. I -- it's -- I don't know how this was      6 created.</p> <p>7 Q Okay.</p> <p>8 A But I -- I did get the information, and it      9 provides the information that -- that's shown here.</p> <p>10 The -- the unreliability, however, was that      11 the union involvement or the union data was being      12 significantly understated. So to the extent that      13 Table 6 is impacted by this unreliable field, assuming      14 we're even talking about the same field, and I'm not      15 sure we are, but if we were then all of these numbers      16 for the unions should, in fact, be higher and which      17 would kind of be going the wrong direction from the      18 position the plaintiffs wish to advocate here.</p> <p>19 Q Is that information based on something that      20 Ms. Taub told you?</p> <p>21 A No. I'm just telling you that -- that I'm      22 just responding to your "if" questions. I was given      23 this information. I'm not sure how it was compiled.      24 I do know that there was this other piece of data that      25 Ms. Taub described as being unreliable, and I don't</p>	<p style="text-align: right;">Page 153</p> <p>1 you say, "Numerous businesses are based on the      2 accepted axiom that information is valuable and can be      3 sold in market-based transactions."</p> <p>4 What do you mean here when you say      5 "market-based"?</p> <p>6 A I'm referring to transactions that are not      7 between related parties.</p> <p>8 Q Okay. And the basis --</p> <p>9 A Let me express it another way. I'm using it      10 the same way an appraiser would. An appraiser looks      11 for market transactions in which to base an opinion      12 regarding fair market value. And so I'm adopting or      13 using the lingo of an appraiser.</p> <p>14 Q Okay. The businesses that you surveyed in      15 this section, including Facebook, Google, FICO, these      16 are companies that are engaged in market competition;      17 is that correct?</p> <p>18 A Well, if you want to look at the Justice      19 Department, they're probably not subject to enough      20 market competition, but I -- I -- I don't know if that      21 really answers the question.</p> <p>22 I would -- they're clearly for-profit      23 enterprises; whether they are monopolists and      24 operating as monopolists is, I guess, a -- for someone      25 else's litigation.</p>

<p style="text-align: right;">Page 154</p> <p>1 Q Would you agree that market competition is 2 important for market-based transactions?</p> <p>3 MR. THOMAS: Objection; vague.</p> <p>4 THE WITNESS: The whole notion of a market 5 suggests that -- that there are buyers and sellers for 6 whatever the good or service is. I don't know if 7 that's answering your question or not.</p> <p>8 BY MS. McCONNELL:</p> <p>9 Q It does.</p> <p>10 Other than the Fund, what is the market for 11 union data?</p> <p>12 A Well, there's not much of a market, which is 13 why this whole study and dispute exists. If there was 14 a readily available market, then probably I wouldn't 15 have had an assignment and you wouldn't have a 16 lawsuit.</p> <p>17 Q So who else are the unions selling this data 18 to?</p> <p>19 A No one.</p> <p>20 Q Okay. So they're not competing with anyone 21 else for the sale of the data?</p> <p>22 MR. THOMAS: Objection to form.</p> <p>23 THE WITNESS: Yeah, I'm not -- when you say 24 they're not competing for -- it's their data so 25 they're not competing for their own data. But perhaps</p>	<p style="text-align: right;">Page 156</p> <p>1 Q Are you under the impression that the unions 2 have a monopoly over the session report data?</p> <p>3 MR. THOMAS: Object to the form.</p> <p>4 THE WITNESS: I've not made that assumption. 5 It -- it could be that -- that some of the recording 6 studios may have that data. The question is whether 7 they've kept it or whether they want to participate in 8 it. But I'm not aware of any other source. So 9 they -- they might -- well, I guess the answer is, 10 I -- I don't know whether anybody else has a copy of 11 some of them. But my understanding is, and what I've 12 reported in my report, is that the unions have the 13 most complete collection and the most long-lasting 14 collection available.</p> <p>15 BY MS. McCONNELL:</p> <p>16 Q Have you researched whether the record labels 17 have a complete collection of this data?</p> <p>18 A The testimony in this matter is that they do 19 not have such data available and that the most 20 complete and available collection is from the unions. 21 And that's what the percipient testimony's been, which 22 I've read.</p> <p>23 Q Do you recall who testified that way?</p> <p>24 A Boy, I think everybody did. I don't think 25 anybody said otherwise. I mean, I didn't compile</p>
<p style="text-align: right;">Page 155</p> <p>1 I misunderstood your question.</p> <p>2 BY MS. McCONNELL:</p> <p>3 Q Are there any other willing buyers for the 4 unions' data?</p> <p>5 A Oh, I'm sure if the union wanted to sell it, 6 oh, they -- I don't doubt for a minute that they could 7 sell their contact list. They've simply chosen not to 8 do so, you know, and I'm not disagreeing with that. 9 But the fact that they have not sold it does not mean 10 that there's not a demand for it.</p> <p>11 Q Why have they chosen to sell it to the Fund?</p> <p>12 A Well, you're ask -- you're probably asking 13 the wrong person. I mean, I could -- my understanding 14 is that the union, consistent with some of the 15 positions the plaintiff has taken, is aware of the 16 fact that it would behoove the unions and the union 17 members to have this information available to the 18 Fund, and therefore, they are making an exception to 19 provide the information to the Fund because they -- 20 the unions sees their purpose and the Fund's purpose 21 to be somewhat aligned.</p> <p>22 But I say that not because I'm a percipient 23 witness or a member of the boards of unions or can 24 read anybody's mind. You should really ask them why 25 they did it.</p>	<p style="text-align: right;">Page 157</p> <p>1 that, but it seemed to be a common theme between all 2 the union representatives and all the Fund 3 representatives. I don't think anybody said 4 otherwise.</p> <p>5 Q Did you look at Dennis Dreith's testimony? 6 It's on your list.</p> <p>7 A I'm sorry -- Dennis Dreith -- oh, I'm sorry, 8 I misunderstood. I've got some background noise. 9 It's a busy day at my house today.</p> <p>10 Yes, I did look at his testimony, and it's 11 included in the list on paragraph 5 on page 2.</p> <p>12 Q Okay. Didn't he testify that there were 13 other sources of this data?</p> <p>14 A I don't recall that, no.</p> <p>15 Q Okay.</p> <p>16 A And if I'm wrong then -- then so be it. But, 17 no, I don't -- that's not my recollection.</p> <p>18 Q Okay. Do you -- are you under the impression 19 that the data collected by the unions has intellectual 20 property protection?</p> <p>21 MR. THOMAS: Object to the form. Vague.</p> <p>22 THE WITNESS: Well, yeah, I'm not sure I know 23 what you're referring to. It -- it's not -- look, 24 I'll just go through the types of intellectual 25 property and -- and --</p>

<p>Page 158</p> <p>1 BY MS. McCONNELL:</p> <p>2 Q Yeah.</p> <p>3 A -- maybe that will answer your question. But</p> <p>4 I'm not suggesting that it's copyrighted. It's not --</p> <p>5 I'm not suggesting it's patented, and I'm not</p> <p>6 suggesting it's trademarked.</p> <p>7 Whether it constitutes a trade secret, I</p> <p>8 guess I'll let the lawyers argue. But it is</p> <p>9 confidential and not being shared with others and by</p> <p>10 virtue of that limited availability, the information</p> <p>11 has value.</p> <p>12 Q Do you know how Facebook's data is protected?</p> <p>13 Meaning, do you know if Facebook's data has</p> <p>14 intellectual property protections?</p> <p>15 MR. THOMAS: Objection; overbroad, vague.</p> <p>16 THE WITNESS: Yeah, you're going quickly have</p> <p>17 me start expressing legal opinions, which I'm not</p> <p>18 intending on doing, but my understanding is that</p> <p>19 there's a specific federal act that involves</p> <p>20 computerized data that I suspect Facebook would</p> <p>21 suggest gives that data protection if someone were to</p> <p>22 steal it.</p> <p>23 Now, additionally, I'm sure Facebook has</p> <p>24 internal policies, procedures with anybody having</p> <p>25 access to that data in which Facebook explains and</p>	<p>Page 160</p> <p>1 with an algorithm and lookup table, the mechanics of</p> <p>2 that are beyond my technical desire.</p> <p>3 Q You mentioned that the unions don't share the</p> <p>4 data with anyone else. Are you aware that the unions</p> <p>5 share the data with the pension funds?</p> <p>6 MR. THOMAS: Objection; I think it misstates</p> <p>7 his prior testimony.</p> <p>8 But you can answer.</p> <p>9 THE WITNESS: Well, there's at least once,</p> <p>10 probably multiple times, when I specifically identify</p> <p>11 that. So when -- this is not a revelation that is not</p> <p>12 already in my report.</p> <p>13 Now, it doesn't bother me at all that in</p> <p>14 connection with the payroll obligation the unions give</p> <p>15 to the pension plans the beneficiaries of the amounts</p> <p>16 that the unions have collected for those -- those same</p> <p>17 beneficiaries. I mean, it -- that would be an</p> <p>18 absolute requirement. And I identify that in my</p> <p>19 report.</p> <p>20 BY MS. McCONNELL:</p> <p>21 Q You mentioned that the data is given from the</p> <p>22 unions to the pension funds pursuant to collective</p> <p>23 bargaining. Do you know what the unions receive in</p> <p>24 return for the provision of the data?</p> <p>25 A They are fulfilling their mission to keep</p>
<p>Page 159</p> <p>1 gets written acknowledgments that -- that someone</p> <p>2 can't go out and start releasing this stuff. I mean,</p> <p>3 that's how most companies deal with proprietary</p> <p>4 information that's internal to their organization. I</p> <p>5 don't know that Facebook does that but I'd be shocked</p> <p>6 if they didn't.</p> <p>7 BY MS. McCONNELL:</p> <p>8 Q Are you --</p> <p>9 A So in that sense there's -- yeah, there is</p> <p>10 some intellectual property protection.</p> <p>11 Q Are you aware that Facebook's algorithms are</p> <p>12 patented?</p> <p>13 A Well, algorithms are different than the data.</p> <p>14 I -- I don't doubt for a second that they're --</p> <p>15 they're either patents or copyrights on their</p> <p>16 software. That -- that I'd -- I'd be surprised if</p> <p>17 they weren't.</p> <p>18 Q Are you under the impression that Facebook</p> <p>19 sells their data or are you under the impression that</p> <p>20 Facebook gives access to others to their algorithms?</p> <p>21 A You know, I'm not familiar with the mechanics</p> <p>22 of how they -- they do it. I -- I do know that the</p> <p>23 business model allows them to collect fees for running</p> <p>24 sponsored ads. I am pretty sure that Facebook</p> <p>25 controls that, but, you know, I -- whether it's done</p>	<p>Page 161</p> <p>1 their members employed and have retirement benefits.</p> <p>2 What they receive is the member dues that -- and --</p> <p>3 and the member's permission to run those retirement</p> <p>4 plans.</p> <p>5 Q Okay. I'll leave that one alone.</p> <p>6 Do you think -- I think you answered this.</p> <p>7 Do you think that the session reports are</p> <p>8 eligible for patent protection? I think you said no,</p> <p>9 right?</p> <p>10 A I'm not expressing any legal opinions, but</p> <p>11 I -- I would not expect them to be a patented item,</p> <p>12 no.</p> <p>13 Q Would you need to assume that they are a</p> <p>14 patented item to use the Georgia-Pacific factors in</p> <p>15 this case?</p> <p>16 A No.</p> <p>17 Q Why not? Let's start there.</p> <p>18 A I would invite your attention to the</p> <p>19 introductory paragraph to conclusion C, as in cat,</p> <p>20 where this entire Georgia-Pacific analysis exists. In</p> <p>21 this introductory paragraph I observe what your</p> <p>22 question just asked and explain why it is that I'm</p> <p>23 using the Georgia-Pacific factors.</p> <p>24 Q You say it's because its "used by analysts to</p> <p>25 address reasonable royalties with other forms of</p>

<p>1 intellectual property," right?</p> <p>2 A I do say that, yes.</p> <p>3 Q Okay. So are you saying that the session</p> <p>4 reports fall under that umbrella of other forms of</p> <p>5 intellectual property?</p> <p>6 A I'm not sure I know what you're referring to.</p> <p>7 Look, this information has value. If you want to</p> <p>8 debate that, that's a different series of questions,</p> <p>9 but I don't think that's what you're asking here.</p> <p>10 The value is for property that is</p> <p>11 intellectual. It is not physical, right, it's not</p> <p>12 like a desk or a chair. So I'm valuing intellectual</p> <p>13 property and I'm using Georgia-Pacific in order to</p> <p>14 gain insights because that landmark case has been used</p> <p>15 on a wide range of intellectual property matters</p> <p>16 extending past patents, which was its initial purpose</p> <p>17 or point.</p> <p>18 Q Okay. So you -- you're aware of courts that</p> <p>19 have used the Georgia-Pacific factors on other forms</p> <p>20 of intellectual property?</p> <p>21 A I don't have any case cites. I -- I expect</p> <p>22 there are. I can tell you that analysts such as</p> <p>23 myself will do that. And it's -- it's just a</p> <p>24 methodology.</p> <p>25 I don't know what any courts have said that</p>	<p>Page 162</p> <p>1 appraiser say that that was a bad idea.</p> <p>2 Q Was it your idea to apply the Georgia-Pacific</p> <p>3 factors to the facts of this case?</p> <p>4 A Yes.</p> <p>5 Q And why did it make sense to you to apply</p> <p>6 Georgia-Pacific to this case that doesn't involve</p> <p>7 patents or intellectual property patent infringement?</p> <p>8 A I would invite your attention to the first</p> <p>9 paragraph which introduces Section C. I already</p> <p>10 referred you to that paragraph, and I believe the</p> <p>11 answer remains unchanged.</p> <p>12 Q And that is?</p> <p>13 A What's in that paragraph.</p> <p>14 Q What is that?</p> <p>15 A Would you like me to read it?</p> <p>16 Q I'd like you to answer the question,</p> <p>17 actually.</p> <p>18 A I just have. I've answered it now at least</p> <p>19 three times. I'm happy to read it to you if you'd</p> <p>20 like me to.</p> <p>21 Q Is it because you think that a reasonable</p> <p>22 royalty rate can be crafted by using the</p> <p>23 Georgia-Pacific factors?</p> <p>24 A I would not agree with that even in a patent</p> <p>25 context. A reasonable royalty rate can be crafted.</p>
<p>Page 163</p> <p>1 it's required and so I don't have any opinions or</p> <p>2 decisions for you that says it's required. But I -- I</p> <p>3 myself and a wide range of other people have done it</p> <p>4 and no one seems to complain that -- or state that</p> <p>5 Georgia-Pacific factors are irrelevant to other forms</p> <p>6 of intellectual property.</p> <p>7 Q Okay. Even -- even if other courts haven't</p> <p>8 said it's required, have you seen or read other courts</p> <p>9 utilize the Georgia-Pacific factors for other forms of</p> <p>10 intellectual property?</p> <p>11 A I am an appraiser. I am not a lawyer. I</p> <p>12 formulate opinions based on appraisal standards. And</p> <p>13 I follow methodologies that are generally accepted by</p> <p>14 others in my field. So I do not look for court</p> <p>15 decisions as the foundation for why something should</p> <p>16 be done. I instead look to economic principles and</p> <p>17 general acceptance within the field that I practice.</p> <p>18 Q In your field of practice which has included</p> <p>19 litigation consulting for many years, have you been</p> <p>20 involved with or read about a case, nonpatent case,</p> <p>21 which used the Georgia-Pacific factors?</p> <p>22 A I've already told you, and I will repeat,</p> <p>23 that I and others, and the others include opposing</p> <p>24 witnesses, have used the Georgia-Pacific factors and I</p> <p>25 don't think I've ever heard anyone who's a competent</p>	<p>Page 165</p> <p>1 I'm going to avoid the argument argument that's</p> <p>2 contained in that word, but it could be crafted by</p> <p>3 using sound appraisal practices and principles. The</p> <p>4 Georgia-Pacific case provides considerations that</p> <p>5 should be used in those appraisal practices and</p> <p>6 principles.</p> <p>7 Q Why do you use the word "royalties" in that</p> <p>8 first paragraph that you've drawn my attention to</p> <p>9 three times?</p> <p>10 A Because this service fee, to use the term</p> <p>11 that the plaintiffs like to use, is in substance a</p> <p>12 royalty. It's a royalty for use of information.</p> <p>13 MS. McCONNELL: Okay. Why don't we take a</p> <p>14 quick five- to ten-minute break and then come back.</p> <p>15 THE WITNESS: Is it -- is it five minutes or</p> <p>16 ten minutes?</p> <p>17 MS. McCONNELL: Let's say five.</p> <p>18 THE VIDEOGRAPHER: Okay. We are now going</p> <p>19 off the record. The time is 2:00 p.m.</p> <p>20 (Recess.)</p> <p>21 THE VIDEOGRAPHER: We are now going back on</p> <p>22 the record, and the time is 2:10 p.m.</p> <p>23 BY MS. McCONNELL:</p> <p>24 Q Okay. I want to look at some of your</p> <p>25 analysis of the Georgia-Pacific factors which start on</p>

<p>1 page 21 of your report.</p> <p>2 For factor number 2, "The rates paid by the</p> <p>3 licensee for use of other similar [intellectual]</p> <p>4 property]."</p> <p>5 You note that the Fund has no similar</p> <p>6 licenses or agreements, right?</p> <p>7 A Yes, ma'am.</p> <p>8 Q Okay. So we don't have an example of other</p> <p>9 rates paid by the Fund for similar intellectual</p> <p>10 property, right?</p> <p>11 A Correct.</p> <p>12 Q Okay. On factor number 3, "The nature and</p> <p>13 scope of the license, such as whether it is exclusive</p> <p>14 or nonexclusive, restricted or nonrestricted in terms</p> <p>15 of territory or customers."</p> <p>16 Does the service agreement have any language</p> <p>17 related to whether -- well, A, whether it's a license,</p> <p>18 and, B, whether it's exclusive or nonexclusive?</p> <p>19 A Well, the service agreement, as I recall,</p> <p>20 does not describe it as a license. I'm doing that</p> <p>21 because of what I told you before, which is the</p> <p>22 economic substance of it is a royalty for the license</p> <p>23 of information.</p> <p>24 And as for it being exclusive or</p> <p>25 nonexclusive, I -- I don't think the union is</p>	<p>Page 166</p> <p>1 Q And then if you can look at factor 12 on</p> <p>2 page 25.</p> <p>3 "The portion of the profit or selling price</p> <p>4 that is customary in the particular business or in</p> <p>5 comparable businesses."</p> <p>6 What are we looking for here typically in a</p> <p>7 patent case or in other cases?</p> <p>8 A Well, this could apply to any sort of</p> <p>9 property. What it basically says is if there's a</p> <p>10 general understanding among industry participants that</p> <p>11 there's an industry rate, then -- then we can do that.</p> <p>12 You don't see industry rates very often, although when</p> <p>13 Georgia-Pacific first came out they -- they were more</p> <p>14 popular.</p> <p>15 But if someone said, for example, and this</p> <p>16 would be more like in a -- in a copyright or trademark</p> <p>17 situation, well, everybody in this industry pays</p> <p>18 5 percent for this, and you say why 5 percent, well,</p> <p>19 that's because there's been so many 5 percent, nobody</p> <p>20 gets more 95 percent, so too bad, it's 5 percent.</p> <p>21 And if you have that sort of mentality within</p> <p>22 an industry then this factor 12 would become</p> <p>23 controlling. But you see that less and less.</p> <p>24 Q And in this case you're not aware of any</p> <p>25 industry standard rates that are applicable?</p>
<p>Page 167</p> <p>1 prevented from giving the information to others. So</p> <p>2 in that sense it's -- it's a nonexclusive arrangement</p> <p>3 even if the union chooses not to license the data to</p> <p>4 others.</p> <p>5 Q Would you agree that the services agreement</p> <p>6 is silent on exclusivity?</p> <p>7 A Okay. We can -- we can express it that way.</p> <p>8 Q Great.</p> <p>9 Factor 4. "The licensor's policy of</p> <p>10 maintaining its [intellectual property] monopoly by</p> <p>11 licensing the use of the [intellectual property] only</p> <p>12 under special conditions designed to preserve the</p> <p>13 monopoly."</p> <p>14 How are you able to apply that factor to this</p> <p>15 case?</p> <p>16 A Well, I will agree that some of these factors</p> <p>17 translate better than others when you get outside of a</p> <p>18 patent context. This particular factor is focused on</p> <p>19 patents and translates and works better with patents.</p> <p>20 Nevertheless, I've -- I've answered the question</p> <p>21 because I didn't want to, you know, say, well, I'm not</p> <p>22 going to worry about that one or...</p> <p>23 So I -- I endeavored to go through all</p> <p>24 factors even if some, as this one is, is less directly</p> <p>25 applicable to non-patent property.</p>	<p>Page 169</p> <p>1 A Agreed. That's what it says.</p> <p>2 Q Okay. Can you -- are you able to give an</p> <p>3 estimate of how many other cases you've used the</p> <p>4 Georgia-Pacific factors in?</p> <p>5 A I've used the Georgia-Pacific factors in</p> <p>6 every case involving a reasonable royalty on patents,</p> <p>7 No exceptions. I've used reasonable --</p> <p>8 Georgia-Pacific -- well, let me back up a second.</p> <p>9 When -- when the question is a royalty rate,</p> <p>10 and it oftentimes is not, but if I've got a non-patent</p> <p>11 case where the remedy is a reasonable royalty, I</p> <p>12 hesitate to say it's a hundred percent, but it's -- if</p> <p>13 it's not a hundred percent it's pretty close. But</p> <p>14 again, I would only do that when the desired</p> <p>15 conclusion is expressed as a reasonable royalty rate.</p> <p>16 Q Do you know how many cases you've used</p> <p>17 Georgia-Pacific where patent law claims were not at</p> <p>18 issue?</p> <p>19 A Well, boy, the answer -- I guess one answer</p> <p>20 would be no. Usually what happens on -- on like</p> <p>21 trademark cases, or even copyright cases, you end up</p> <p>22 with lost profits or disgorgement as the primary</p> <p>23 remedy and so you -- you know, I've done hundreds of</p> <p>24 those cases. And you don't normally see reasonable</p> <p>25 royalty as -- as the -- as the remedy, the monetary</p>

<p style="text-align: right;">Page 170</p> <p>1 remedy that's being sought.</p> <p>2 So I can't tell you how many of those</p> <p>3 hundreds have expressed them as reasonable royalty but</p> <p>4 I'm pretty sure that may be a hundred percent of them</p> <p>5 when they're expressed in that manner I've used</p> <p>6 Georgia-Pacific. I don't have a number of what that</p> <p>7 is other than it's probably all of them.</p> <p>8 Q You mentioned that you use Georgia-Pacific</p> <p>9 when the desired conclusion is expressed as a</p> <p>10 reasonable royalty rate. Wouldn't you agree that</p> <p>11 there are other alternatives for compensation for the</p> <p>12 unions instead of what you call a royalty rate?</p> <p>13 A I probably don't understand your question.</p> <p>14 But, for example, plaintiffs' contention is that it's</p> <p>15 for free and so I guess for free means you don't need</p> <p>16 a royalty rate or anything else. So --</p> <p>17 Q Couldn't it be --</p> <p>18 A -- I'd have to agree -- I'm sorry?</p> <p>19 Q Couldn't it be a flat fee?</p> <p>20 A You can express royalties as a flat fee.</p> <p>21 They're not as common, particularly with things that</p> <p>22 have proven their value. But if -- I've -- I've done</p> <p>23 royalty valuations where it's been expressed as a flat</p> <p>24 fee.</p> <p>25 Q Could you have a subscription fee model</p>	<p style="text-align: right;">Page 172</p> <p>1 And -- and that's true across the board.</p> <p>2 Q Which -- which companies, starting on page 14</p> <p>3 of your report, charge percentages based on usage?</p> <p>4 A Well, I've already told you it really doesn't</p> <p>5 matter too much whether you do it as a percentage.</p> <p>6 I'm expressing it as a percentage here because that's</p> <p>7 the way the agreement was crafted.</p> <p>8 But in any event, I'll be happy to go through</p> <p>9 this and give you my -- my reactions.</p> <p>10 The mailing list industry is not expressed as</p> <p>11 a percentage because the mailing list industry does --</p> <p>12 does not wish to risk share with their licensee. So</p> <p>13 this is an example of where the risk -- they're --</p> <p>14 risk sharing's just the opposite of what happens here.</p> <p>15 And the mailing list gets paid a flat fee for</p> <p>16 a given size list so you could express that this --</p> <p>17 the fee is at per unit or as a flat fee. But</p> <p>18 generally, if it's a bigger list, it's going to get</p> <p>19 more money so the per unit fee is going to be more</p> <p>20 sensible.</p> <p>21 Q Can I cut you off and go to number 2, I'm</p> <p>22 sorry, because you mentioned risk sharing, and I'm</p> <p>23 wondering what is the risk sharing that you were</p> <p>24 describing in terms of the mailing list industry?</p> <p>25 A Well, the -- the mailing list industry says</p>
<p style="text-align: right;">Page 171</p> <p>1 instead of a royalty rate percentage?</p> <p>2 A Well, depends on what the -- how the</p> <p>3 subscription fee is expressed, but I think what you're</p> <p>4 saying is that if you could say, well, we're going to</p> <p>5 charge X cents per amount received per artist, or --</p> <p>6 or per track, because that's how SoundExchange reports</p> <p>7 it, I suppose you could do that.</p> <p>8 You can express royalties in any form you</p> <p>9 want, whether it's a flat fee, a per unit amount or</p> <p>10 percentage amount. But ultimately the economics are</p> <p>11 all the same. Well, you know what, I -- they're not</p> <p>12 all the same. The risk sharing is different if you're</p> <p>13 dealing with a flat fee. But if you're dealing with</p> <p>14 a -- a per unit versus a percentage, you -- you get a</p> <p>15 kind of -- you could end up in the same direction.</p> <p>16 Q Do any of the for-profit businesses that you</p> <p>17 described in your report use a percentage-based</p> <p>18 royalty rate?</p> <p>19 A Well, some of them don't describe it as a</p> <p>20 royalty, but clearly there are some fees being paid as</p> <p>21 a percentage. I -- I would say all of them are based</p> <p>22 on quantity of some sort, so whether they express them</p> <p>23 as a percentage, there's no question that the use of</p> <p>24 intellectual property or the fee for the use of</p> <p>25 intellectual property increases as the usage goes up.</p>	<p style="text-align: right;">Page 173</p> <p>1 we're not going to charge you less if you don't</p> <p>2 generate sales, it's your problem to generate sales,</p> <p>3 so we're going to charge you an amount of money and we</p> <p>4 get the money whether you're successful or not.</p> <p>5 Q Okay. Sorry, I cut you off. You were going</p> <p>6 to give more examples?</p> <p>7 A Okay. Well, the next one is Google and</p> <p>8 Facebook. Google, you know, I'm not familiar with --</p> <p>9 with the details of their pricing, and they're</p> <p>10 probably evolving, but most of what Google does, I</p> <p>11 believe, is on a -- a per impression basis. So you</p> <p>12 get paid for X number of impressions.</p> <p>13 I -- I'm not telling you that Google doesn't</p> <p>14 have other means of contracting. We probably could</p> <p>15 read about that in their annual report.</p> <p>16 Facebook I'm guessing is the same way, but</p> <p>17 again, I'm not -- it's not important -- I'm trying to</p> <p>18 answer your question, but it's not important to my</p> <p>19 conclusions. But whatever the answer is you could</p> <p>20 probably get from the annual report.</p> <p>21 Fair Isaac's has a -- as I understand it, a</p> <p>22 number of -- of license arrangements, but it's -- it's</p> <p>23 all going to be based on -- on usage. So if -- if</p> <p>24 you're running more reports, you're going to charge --</p> <p>25 get charged for money. And I just don't know how</p>

1 their contracts are expressed. But again, I'm sure  
2 that you -- you could probably read a paragraph in the  
3 annual report if that was of primary significance to  
4 you. It, by the way, was not a primary significance  
5 to me.

6 Nielsen runs most of their contracts unique  
7 to a -- a user. So if you contact Nielsen, they want  
8 to know what are you going to use it for and who are  
9 you and how many reports are you going to get and then  
10 they give you pricing. Again, though, it's based on  
11 anticipated usage and who you are.

12 Q It's not based on the profits that you are  
13 anticipating to get from usage?

14 A Oh, yeah, absolutely. One of the things  
15 that's interesting about all of these is that none of  
16 them do the -- the people who -- who are getting the  
17 fee, you know, are -- are they changing the fee based  
18 on, you know, whether you're successful or not. So --  
19 and -- and -- and that's -- that's the -- the genesis  
20 of the comment that I've got later in the report.

21 So Google doesn't say we're only going to  
22 charge you if you're successful in making a sale. We  
23 give you the impression, you pay for it, whether you  
24 can make a sale or not is your problem. And the same  
25 thing's true I think for pretty much all of these.

1 Nielsen, for example, you know, doesn't talk  
2 to you about whether the ad is -- is effective or not.  
3 They simply tell you how many viewers there are.

4 Q Right.

5 A So the -- the credit union -- I'm sorry, the  
6 credit reporting folks, again, they -- they have  
7 different ways of coming up with contracts. I was not  
8 summarizing that. I'm sure it's in their publicly  
9 traded items, but I'm -- I'm quite sure that it's a  
10 function of -- of volume.

11 LexisNexis, which is effectively number 6, is  
12 a usage-based service, by and large. If you have a  
13 very large law firm or very large user, you can come  
14 up with a flat fee for the year, but then it's subject  
15 to renegotiation every year based on the -- the usage  
16 again.

17 The title companies in number 7 are actually  
18 percentage-based. The larger transactions get higher  
19 fees. And that's just the way that industry works.

20 So now I've run through the companies. I --  
21 I hope that was helpful to you.

22 Q It was. Thank you.

23 Has your application of the Georgia-Pacific  
24 factors been rejected in any case?

25 A No. Well, hold on, you know what, I may have

1 been too quick on that. When you said "rejected," I  
2 thought I knew what you meant and maybe I didn't.  
3 Maybe I was just too quick.

4 When you said "rejected," what I interpreted  
5 that question to be was, was it not allowed by the  
6 Court to be presented as admissible evidence. Is that  
7 what you meant?

8 Q Either you were not allowed to testify  
9 because the Court found that Georgia-Pacific did not  
10 apply or the Court said Georgia-Pacific did not apply?

11 A None of those circumstances arose.

12 Q Okay. We've said it a few times, but you --  
13 you compared the provision of data to the Fund to a  
14 license, correct?

15 A Yes.

16 Q Is there a term for the license?

17 MR. THOMAS: Object to the form.

18 THE WITNESS: I -- I'm not aware of a term as  
19 I think you're -- you're typically reporting it. I  
20 think the parties are anticipating that the agreement  
21 will continue until it's amended.

22 BY MS. McCONNELL:

23 Q Okay. If the Fund terminated the services  
24 agreement, does the Fund have an obligation to return  
25 the data that it has received from the unions?

1 A You know what, I'm going to leave that for  
2 the next plaintiff and defendant on that lawsuit. I  
3 mean, it -- it -- it would almost certainly be a -- a  
4 lawsuit. I don't think you can grab someone's  
5 information, use it into perpetuity, and say, oh, by  
6 the way, we're -- you know, we're not going to pay you  
7 anymore.

8 But if -- if -- if someone says that that's  
9 the poor drafting of an agreement, then that's fine,  
10 I'll leave that for the next lawsuit.

11 Q Okay. So if -- if someone says that the  
12 provision of the data was actually a sale of data and  
13 now the Fund owns the session reports that were  
14 transmitted to it, then you would say they don't have  
15 an obligation to return it?

16 A Oh, I -- no, hold it. I -- I didn't say  
17 that. Well, look, first of all, I think -- I think  
18 ultimately you're asking me to interpret a contract.  
19 And I'm not doing that.

20 What I'm doing is saying what is a reasonable  
21 fee for what's been provided. And what I'm telling  
22 you is a reasonable -- the 3 percent that the parties  
23 came up with is a reasonable fee for a continued  
24 relationship.

25 Now, if the Fund is able to say we're going

1 to keep your data and not have to pay you because  
 2 there was an oopsy somewhere, and we're going to hold  
 3 you to that oopsy, even though that clearly was not  
 4 the intentions of the parties, that does not change my  
 5 conclusion.

6 The conclusion under that set was someone  
 7 meaning the Fund is taking advantage of an oopsy by  
 8 the part of the unions. And -- and the fact that --  
 9 that something -- something may be an oopsy does not  
 10 change its economic value. So my conclusions are not  
 11 oriented to what is legally permissible under a  
 12 contract. It is instead what is a reasonable value in  
 13 consideration for what's been exchanged between the  
 14 parties.

15 Q Haven't you interpreted the contract by  
 16 calling it a license?

17 A No.

18 Q There's nowhere in the contract that says  
 19 that it's a license, right?

20 A I don't have to call it a license. Look,  
 21 I'm -- I'm simply saying that there is methodologies  
 22 available for coming up with an economic answer or a  
 23 valuation conclusion and -- and we can look at that by  
 24 realizing that this is expressed as a percentage.

25 I don't know that you would change the answer

1 word "royalty," we can put in the word "service fee,"  
 2 if that's the only thing that's differentiating the  
 3 parties. I'm not sure it's going to change anything.  
 4 I'm -- I'm simply describing it as -- as a  
 5 royalty and as a license because that is the language  
 6 of business that is typically used for this type of  
 7 transaction. If you or the other parties or the Court  
 8 decide that they don't want to use that language, I  
 9 don't think -- I'm quite sure it doesn't matter.

10 Q When you use a patent without a license you  
 11 can be sued for infringement, right?

12 A You can.

13 Q And that's the same for copyright and  
 14 trademark?

15 A You can.

16 Q So no matter how you come into possession of  
 17 those assets you can be restricted by law for using  
 18 them without permission, right?

19 A That's correct.

20 Q And that's why you need to license the asset?  
 21 So that you don't get sued?

22 A Well, maybe that's the way a lawyer would  
 23 express it. But that's not how I would express it. I  
 24 would express it that if you owned someone else's  
 25 property you should pay fair value for it. And -- and

1 at all if someone said, I'm going to give a ruling  
 2 that says the word "license" has to be omitted from  
 3 Nolte's report. It's just a ruling, says "redacted."  
 4 Nolte can call it something else, but he can't call it  
 5 a license. He can call it a kibitzer bong. So we're  
 6 going to call -- you can't call it a license, he can  
 7 call it whatever he wants, if it's a kibitzer bong,  
 8 fine.

9 I think I could rewrite the report, take out  
 10 the word "license," insert the word "kibitzer bong"  
 11 and I'm not sure any conclusions are going to be  
 12 changing because my conclusions are economically  
 13 based, not based upon on a legal interpretation of the  
 14 word "license."

15 Q Doesn't it need to be a license for you to  
 16 say that the unions are entitled to a royalty for use  
 17 of it?

18 A Again, you know, I -- I've done numerous  
 19 assignments where I've looked at the reasonableness of  
 20 royalties. I've -- and I'm -- I'm -- that's how these  
 21 types of agreements are oftentimes expressed.

22 But if someone says, no, no, no, you can't  
 23 call it a royalty, it has to be a service fee, if you  
 24 don't call it a service fee, then it can't be right.

25 Fine. Run through the report, we can take out the

1 not because you're going to get sued, but because it's  
 2 the right thing to do. But whatever. If -- if -- if  
 3 you know, if -- if your reason is that don't have to  
 4 do the right thing, you just have to do what's not --  
 5 what you have to do to not get sued, then, okay.

6 Q Here we go.

7 Okay. If the Fund found the unions' data by  
 8 the side of the road, would any similar restrictions  
 9 apply?

10 A I don't know what you mean by "similar," but  
 11 I would tell you this. If something is a secret, it's  
 12 someone's personal private property, and they find it  
 13 by the side of the road, and they don't have the right  
 14 to use it, it should be returned.

15 Now, this may get back to, oh, well, I can  
 16 use I and not get sued, it's like, okay, fine, if  
 17 that's the way you want to conduct your life, that's  
 18 fine. But I'm telling you that if you use someone's  
 19 property and you don't own it and don't have  
 20 permission to use it the right thing to do is return  
 21 it.

22 Q If the person who owns the property hasn't  
 23 done anything to protect it and they've left it on the  
 24 side of the road or they've posted it on Reddit,  
 25 wouldn't you agree that there is no protection for

1 that data and the person can use it without feeling  
 2 any sort of moral sadness or feeling like they're  
 3 going to be sued?  
 4 A Well, being sued and feeling moral sadness  
 5 are two different things.  
 6 Q I know. That's why I said "or."  
 7 A But in any event, I do understand that as  
 8 a -- as a legal requirement that someone seeking trade  
 9 secret protection has to make efforts to keep it a  
 10 secret. And so the question comes up of what happens  
 11 if someone steals it. A disenfranchised employee, a  
 12 hacker, someone else.  
 13 Now, you said left on the side of the road.  
 14 Well, how did it get left on the side of the road, is  
 15 because, you know, it was in someone's car and they  
 16 opened the door and something fell out and it was an  
 17 accident, does that mean that -- you know, look, I'll  
 18 let people who want to fight over lawsuits on that.  
 19 But I'm telling you that the secret has value  
 20 as long as its use is restricted and if you don't own  
 21 it, the right thing to do is either pay for it or  
 22 return it.  
 23 MS. McCONNELL: I'm just going to move that  
 24 strike that response because I have no idea what you  
 25 were answering.

1 Q But in your report you talk about law firms'  
 2 arrangements with LexisNexis. To your knowledge, do  
 3 law firms license information from LexisNexis or do  
 4 they have a subscription to use LexisNexis?  
 5 A In the context that you just raised it, I  
 6 would view those two terms as synonymous. If -- I  
 7 don't really care whether someone calls it a  
 8 subscription or a license. It has the same economic  
 9 impact.  
 10 Q Okay. Are you aware of other data services  
 11 companies that are subscription-based?  
 12 A Sure.  
 13 Q Can you give some examples?  
 14 A Subscriptions typically refer to a recurring  
 15 fee that is paid for, you know, whatever you've got.  
 16 Subscription businesses are -- are very much in vogue  
 17 now so you see lots of -- of businesses that are  
 18 selling products as subscriptions.  
 19 Subscriptions first started in the print and  
 20 publishing business where you bought a subscription to  
 21 a magazine or a subscription to a newspaper and that  
 22 newspaper or magazine would show up periodically. But  
 23 now you can buy almost anything on a monthly or  
 24 periodic service plan. So food or -- or almost  
 25 anything --

1 Q Data?  
 2 A -- that you might want to consume.  
 3 Q Data?  
 4 A What's that?  
 5 Q Including data?  
 6 A You know, I've already told you that the use  
 7 of the world "royalty" was not important to me. If  
 8 you wanted to call this a subscription and so we have  
 9 a subscription fee of 3 percent, I wouldn't quarrel  
 10 with that. I think I told you before we could call  
 11 the license a kibitzer bong, so I sure don't care if  
 12 you call it a royalty subscription.  
 13 I'm -- I'm -- I'm -- my conclusions don't run  
 14 to the names. The names are -- are just there to help  
 15 communicate. What -- what matters is -- is the  
 16 3 percent reasonable.  
 17 Q Do you know if LexisNexis has the ability to  
 18 demand the return or destruction of any information  
 19 downloaded from its site after a user's subscription  
 20 expires?  
 21 A I'm sure they don't.  
 22 Q Okay. Have you heard of IMDbPro?  
 23 A Yes.  
 24 Q Are you aware that that is a  
 25 subscription-based service where you pay a flat fee

1 per month?  
 2 A Okay. If you say so. Yeah, I haven't looked  
 3 at the pricing of IMDbPro for a while.  
 4 Q Okay. Are you aware of a website called  
 5 baseball-reference.com?  
 6 A Baseball-reference?  
 7 Q Yes.  
 8 A No.  
 9 Q Okay. I'll represent to you that that's  
 10 another monthly subscription-based service where you  
 11 can access statistics from baseball players from the  
 12 minor leagues to the major leagues.  
 13 Have you heard of that before?  
 14 A Still haven't heard of it, but -- but --  
 15 Q Okay.  
 16 A So my prior answer stands.  
 17 Q Why didn't you look into web sites like  
 18 IMDbPro or baseball-reference.com when you were  
 19 creating your report?  
 20 A I suppose I could have. If -- if someone  
 21 said that instead of looking at these other businesses  
 22 that I describe in Section A of my report I could  
 23 include other lesser-known businesses to substantiate  
 24 the position that information is valuable and can be  
 25 sold or licensed or subscribed to, whatever word you

<p>1 want to use, I could do so.</p> <p>2 I did tell you in response to an earlier</p> <p>3 question that I stopped conclusion A when I did</p> <p>4 because I thought the point was made and I didn't want</p> <p>5 to beat a dead horse. But there are no doubt hundreds</p> <p>6 of other businesses that get paid for information that</p> <p>7 people want.</p> <p>8 Q You agree that LexisNexis does not charge</p> <p>9 more if a law firm is profitable or if a law firm is</p> <p>10 not profitable, correct?</p> <p>11 A Agreed.</p> <p>12 Q Okay. So meaning they don't increase their</p> <p>13 subscription price because they know that this</p> <p>14 plaintiff's firm is doing very well this year,</p> <p>15 correct?</p> <p>16 A Well, I don't run LexisNexis, but what you</p> <p>17 said is my understanding.</p> <p>18 Q Perfect.</p> <p>19 You state that the current service fee</p> <p>20 structure presents a no-risk situation. And that's on</p> <p>21 page 26 of your report.</p> <p>22 Isn't there a risk that the Fund is</p> <p>23 overpaying for the data and services that are being</p> <p>24 provided by the unions?</p> <p>25 A If you wish to express it that way, sure.</p>	<p>Page 186</p> <p>1 MR. THOMAS: Objection; calls for legal</p> <p>2 conclusion.</p> <p>3 THE WITNESS: Yeah, and I -- I -- I think</p> <p>4 that's -- that's -- you're -- you're asking me to come</p> <p>5 up with a hypothetical that -- that I'm not sure is</p> <p>6 yet described in the records.</p> <p>7 But the records that I'm aware of indicate</p> <p>8 that the unions continue to provide information. The</p> <p>9 union contracts continue to be important in terms of</p> <p>10 their position in the creation of music and that the</p> <p>11 unions are, in fact, continuing to provide value.</p> <p>12 If -- if they don't provide value, then --</p> <p>13 you know, you asked me a question about the term of</p> <p>14 the agreement, then -- then maybe the term would need</p> <p>15 to be revisited.</p> <p>16 But I do have tables in my report that</p> <p>17 suggest that the union data continues to have</p> <p>18 relevance and importance and -- and a significant</p> <p>19 volume to indicate that your hypothetical is not</p> <p>20 realistic in the facts and circumstances that actually</p> <p>21 exist.</p> <p>22 BY MS. McCONNELL:</p> <p>23 Q On page 14 of your report you say, in the</p> <p>24 first full paragraph under A, the last sentence under</p> <p>25 that paragraph, "Under this incorrect notion, the</p>
<p>Page 187</p> <p>1 That is not what that comment is -- is dealing with.</p> <p>2 It's dealing with a -- a different issue that I've</p> <p>3 described to you earlier.</p> <p>4 Q And what's that?</p> <p>5 A Well, it's the subject of -- of whether</p> <p>6 the -- you know, we're going to charge you a fee</p> <p>7 regardless of whether SoundExchange gives you any</p> <p>8 money or not. So if for whatever reason SoundExchange</p> <p>9 stops giving you money or the law -- or whatever, the</p> <p>10 law changes, then you're not -- you, the Fund, are not</p> <p>11 stuck charging a fee that was calculated or</p> <p>12 contemplated on a different basis.</p> <p>13 The percentage fee is less risky than another</p> <p>14 sort of way of denominating the fee.</p> <p>15 Q Okay. So you're expressing the risk as the</p> <p>16 Fund not receiving any money, then the unions won't</p> <p>17 receive any money, right?</p> <p>18 A I was looking at it from the Fund's</p> <p>19 perspective, yes. The -- the Fund is not in a</p> <p>20 situation where they've increased fixed overhead that</p> <p>21 would have to be paid regardless of what monies they</p> <p>22 get from SoundExchange.</p> <p>23 Q But isn't it true that the Fund is obligated</p> <p>24 to pay the 3 percent fee to the unions regardless if</p> <p>25 they get any information from the unions?</p>	<p>Page 187</p> <p>1 unions should not be compensated for either their past</p> <p>2 efforts, or for proportionate current cost of the</p> <p>3 unions' operations that are required for the</p> <p>4 incremental efforts to be incurred."</p> <p>5 Do you know how much the unions' past efforts</p> <p>6 cost?</p> <p>7 A No.</p> <p>8 Q Are you -- are you able to put a dollar value</p> <p>9 on it?</p> <p>10 A If someone wanted me to accept that</p> <p>11 assignment, I think I have the competence and ability</p> <p>12 to do so. But -- but if you're asking me have I done</p> <p>13 it yet or tried to do it yet, the answer's no.</p> <p>14 Q Do you know what the incremental cost of the</p> <p>15 unions' current efforts are?</p> <p>16 A That would not be relevant to a proper answer</p> <p>17 so I did not do that.</p> <p>18 Q In order to figure out what the incremental</p> <p>19 costs are, you would need to know how much effort the</p> <p>20 unions were putting in to respond to requests, right?</p> <p>21 A Yes.</p> <p>22 Q You say in the next paragraph that, "Numerous</p> <p>23 compensation arrangements are based on a percentage of</p> <p>24 an underlying transaction."</p> <p>25 Would you agree that money managers,</p>

<p>Page 190</p> <p>1 contingency lawyers, IntellAgents, are paid a 2 percentage of an underlying transaction because they 3 add value to the transaction?</p> <p>4 A Well, that's certainly what those service 5 providers suggest, and their clients and customers 6 must agree.</p> <p>7 Q Would you agree that it is a Realtor's goal 8 to increase the amount of money a homeowner will get 9 for selling his house?</p> <p>10 A That is a common myth. But, no, I don't 11 think that's actually correct.</p> <p>12 Q Why not?</p> <p>13 A Why not what?</p> <p>14 Q Why wouldn't a Realtor representing a 15 homeowner want to increase the value a homeowner gets 16 for selling his house?</p> <p>17 A Well, what you -- those -- the two statements 18 you've made are not mutually exclusive. If all other 19 things being equal -- well, you want to shake your 20 head no, you know, that's fine, roll your eyes and 21 shake your head. What's your next question? I 22 don't -- I don't need to take this either. Go ahead.</p> <p>23 What's your next question? You don't like 24 this answer, and I'm getting insulted by your 25 appearance and shaking your head and rolling your</p>	<p>Page 192</p> <p>1 to make certain that the property gets sold before 2 their -- their listing period expires and they lose 3 the transaction to another Realtor. So the Realtor 4 would much rather have a percentage commission of a 5 slightly smaller price than to try to get the top 6 dollar.</p> <p>7 Anyone who's worked with experienced Realtors 8 for a long while realizes this. They would gladly 9 have more money, but they don't want to sacrifice the 10 existence of a commission entirely because they were 11 trying to seek the last extra dollar of sales price.</p> <p>12 Q Is it your opinion that the amount of money 13 paid to each Fund beneficiary has increased because 14 the unions are able to send across a session report?</p> <p>15 MR. THOMAS: Object to the form. Vague.</p> <p>16 THE WITNESS: You made a statement. I was 17 waiting for your question.</p> <p>18 BY MS. McCONNELL:</p> <p>19 Q Is it your opinion that the amount of money 20 paid to each Fund beneficiary has increased because 21 the unions are able to send across a session report?</p> <p>22 A That is not my primary opinion. What you 23 said may be true, but that is not the primary opinion.</p> <p>24 The primary opinion is that the union data 25 allows more accurate payments be made to a larger</p>
<p>Page 191</p> <p>1 eyes, so go ahead, what's your next question?</p> <p>2 Q You actually do have to answer my questions, 3 Mr. Nolte, so we can keep going or we can stop the 4 deposition now. It's up to you.</p> <p>5 A We -- we can keep going, but I don't need the 6 reactions that were just happening. But I'll tell you 7 what, I'll -- I'll answer the question, but -- but 8 there's some level of decorum would be appreciated.</p> <p>9 Q You know what, timeout really quick.</p> <p>10 MS. McCONNELL: I just want to put on the 11 record that this witness has been extremely rude to me 12 all day and I've been sitting here and taking it and 13 anyone who wants to read this transcript and -- and 14 hear what has been going on all day, I would very much 15 welcome them to do that.</p> <p>16 But I'm not going to let you tell me that I 17 am being rude to you. It's almost 3 o'clock. I've 18 had it with this deposition. So let's just finish it 19 and be done because I -- I really don't want to 20 continue this for another day. So let's do that.</p> <p>21 Q Answer my question.</p> <p>22 A Your question was, why wouldn't a Realtor 23 want a higher price, and the answer is, they would 24 want a higher price if everything else would be kept 25 alone. But, in fact, what a Realtor really wants is</p>	<p>Page 193</p> <p>1 group of people and that that allows the Fund to 2 accomplish its mission in a way that would otherwise 3 not be possible.</p> <p>4 Now, it is highly likely that what you said 5 is also true, but that is not the primary basis for 6 the -- the conclusions that I've reached.</p> <p>7 Q So you do think that the amount of money paid 8 to each Fund beneficiary has increased because of the 9 unions' data?</p> <p>10 MR. THOMAS: Objection; vague, overbroad.</p> <p>11 THE WITNESS: That is a possibility, but that 12 is not the primary opinion. The primary opinion 13 involves the accuracy of amounts that have been paid 14 versus the total amount that's paid.</p> <p>15 Look, look, that's not a complex thing.</p> <p>16 Let's say someone decides we don't want to pay the -- 17 the 3 percent fee but why don't we just take all the 18 money and give it to Mr. Risto. Nobody gets anything 19 else, Mr. Risto gets everything, and we'll cut out all 20 that research department. We'll certainly cut out the 21 3 percent legal fee. We'll cut out all -- all this 22 other stuff and won't the total amount of money paid 23 specifically to Mr. Risto increase. And the answer 24 is, of course.</p> <p>25 But that's not the objective and mission of</p>

<p style="text-align: right;">Page 194</p> <p>1 the Fund. And, you know, so the fee doesn't have to 2 be reasonable because it increases the -- the amount 3 paid. It -- it might in fact do that, but that's not 4 the primary reason why the fee is reasonable.</p> <p>5 MS. McCONNELL: I'm going to move to strike 6 as nonresponsive.</p> <p>7 Q Are the beneficiaries of the Fund entitled to 8 their money from the Copyright Act -- strike that. 9 Fund beneficiaries are entitled by the 10 Copyright Act to their royalty percentages whether or 11 not the unions locate them, right?</p> <p>12 MR. THOMAS: Objection to the form. Calls 13 for a legal conclusion.</p> <p>14 THE WITNESS: I do think it calls for a legal 15 conclusion. The -- the question arises as to what 16 happens if a nonfeatured performer simply cannot be 17 located. The Fund has recently taken steps to ensure 18 that monies are distributed in some -- what -- what 19 the Fund believes are a fair and equitable manner 20 consistent with the public reporting that they've 21 done. Maybe that conflicts with what you've just 22 said, maybe it doesn't, but it -- that's outside the 23 scope of my opinion.</p> <p>24 MS. McCONNELL: Okay. Nico, the next one, 25 please, the article. And I think this is Exhibit 5.</p>	<p style="text-align: right;">Page 196</p> <p>1 manner in which the -- the transaction's been 2 documented, but I've not been asked to do that either. 3 BY MS. McCONNELL: 4 Q Did you find that the services agreement 5 transaction was documented professionally and 6 comprehensively?</p> <p>7 MR. THOMAS: Same objections; asked and 8 answered.</p> <p>9 THE WITNESS: I gave you my best answer a 10 minute ago. You must think you want a different 11 answer. I -- I don't think there's any disagreement 12 regarding what the document says. If I'm wrong then 13 let me know. But I -- I haven't read a bunch that -- 14 that said we don't understand the meaning of -- of 15 this agreement.</p> <p>16 So in that sense I'm not aware of anything 17 that says that the document does not comprehensively 18 state what the intentions of the parties were.</p> <p>19 BY MS. McCONNELL:</p> <p>20 Q Do you know whether there was any evaluation 21 of the, your words, intellectual property that was 22 being sold at the time of the services agreement was 23 adopted?</p> <p>24 A I've read this -- the deposition testimony on 25 this point, and I -- it's not my testimony. So I'm</p>
<p style="text-align: right;">Page 195</p> <p>1 (Exhibit 5 marked.)</p> <p>2 MS. McCONNELL: It's in the chat and then 3 it's going to be shared.</p> <p>4 MR. BRANCOLINI: Sorry, Mariana, is this the 5 article you wanted?</p> <p>6 MS. McCONNELL: Steps in Evaluating 7 Intellectual Property.</p> <p>8 MR. BRANCOLINI: Sorry, I put the wrong 9 article in.</p> <p>10 BY MS. McCONNELL:</p> <p>11 Q Have you seen this article before?</p> <p>12 A Yes.</p> <p>13 Q Okay. Do you know who wrote it?</p> <p>14 A Well, it may have gone through revisions, but 15 the initial authoring I was involved in. I don't 16 recall whether I had help or not.</p> <p>17 Q Okay. The first subheading is, "Get Legal 18 Advice." It goes on to say, "Any transaction must be 19 documented professionally and comprehensively."</p> <p>20 Did you find that the services agreement 21 transaction was documented professionally and 22 comprehensively?</p> <p>23 MR. THOMAS: Object to the form. Outside the 24 scope of the expert opinion.</p> <p>25 THE WITNESS: I have not criticized the</p>	<p style="text-align: right;">Page 197</p> <p>1 not sure I know what you're asking me.</p> <p>2 Q Do you want me to rephrase the question?</p> <p>3 A Well, if -- if my answer was not adequate, by 4 all means, do so.</p> <p>5 Q Did you find that there was any evaluation of 6 the intellectual property that was being sold at the 7 time the services agreement was adopted?</p> <p>8 MR. THOMAS: Objection; vague.</p> <p>9 THE WITNESS: There was quite a bit of 10 discussion about how this was evaluated in the 11 depositions that plaintiffs took.</p> <p>12 BY MS. McCONNELL:</p> <p>13 Q Which deposition are you referring to?</p> <p>14 A Well, I think all of them. I mean, you or 15 your cocounsel were taking the depositions so you've 16 asked and got answers for whatever the process was.</p> <p>17 I'm well aware that you have at least one 18 expert report that criticizes that process. I am not 19 criticizing the process, and I'm not saying the 20 process was good either. My work falls outside the 21 process of the initial evaluation.</p> <p>22 Q Okay. To prepare your report did you consult 23 anyone about the language of the relevant sections of 24 the Copyright Act?</p> <p>25 A You'd asked that question before.</p>

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1 No, I did not. Now, however, I believe my  
2 definition of the assignment was oriented to comply  
3 with the Copyright Act, but that's not the way it was  
4 articulated.

5 MS. McCONNELL: I think Nico might be -- oh,  
6 here -- oh, you're on it. Okay. Great.

7 Q So the next section of this article is titled  
8 "Understand the Markets Being Served."  
9 In preparing your report did you undertake an  
10 analysis of the markets being served?

11 A Well, allow me to read this because I haven't  
12 read it in a decade. So hold on.

13 Q Sure.

14 A All right. So I read the paragraph or two,  
15 however you want to count it. It's -- under that  
16 heading. I don't believe anything there conflicts  
17 with anything I've done here. Obviously this is a  
18 general article that covers a wide range of  
19 intellectual property. It's not tailored to the  
20 situation that exists here. But nevertheless, I don't  
21 see anything that conflicts.

22 Q In our case what is the nature and size of  
23 the market being served?

24 A As the report identifies, and I can highlight  
25 where, if that's valuable to you, I repeatedly state

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1 unique. So we don't have any situation of where  
2 others were -- where the unions were selling this  
3 information. If the unions were selling this  
4 information otherwise, then the assignment would be  
5 easy. And I've just got done telling you it's not  
6 easy because you don't have that type of beginning  
7 situation.

8 Q Are you aware that in their testimony Jon  
9 Joyce and Bruce Bouton expressed some dissatisfaction  
10 that the service fee was getting too high in the most  
11 recent years?

12 MR. THOMAS: Objection; mischaracterizes the  
13 testimony in those depositions. So lacks foundation.

14 THE WITNESS: I have told you on multiple  
15 occasions that the depositions that I've reviewed are  
16 listed in my report. And if they're not listed in my  
17 report, I haven't reviewed them.

18 I suspect you've asked me a couple times  
19 about these individuals and I've told you that I have  
20 not read their depositions. So as a result, I have no  
21 basis for agreeing or disagreeing with your  
22 characterization of what they said.

23 BY MS. McCONNELL:

24 Q Okay. For purposes of this question, assume  
25 that they did say that in their deposition. Would

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1 that the Fund has a need for this information and that  
2 the unions have not provided this information to  
3 anyone else save, you know, with the exception of  
4 making certain that pension obligations are -- have  
5 been handled consistent with -- with what everybody's  
6 understanding was from the very beginning. So that  
7 this assessment is not and cannot be based on either  
8 industry rates, established royalty rates or other  
9 things that would make the assignment easy.

10 Now, just because an assignment is not easy  
11 does not mean that it's -- the answer is wrong or that  
12 the answer has to be zero. But the market -- this  
13 is -- this is not an assessment that is based on other  
14 market participants.

15 Q Did -- in our case did you consider the price  
16 that customers were willing to pay?

17 A Well, the -- the pricing is certainly  
18 important if you're dealing with something that's  
19 going to be sold to the marketplace or a general range  
20 of customers. So in this article, for example, if  
21 someone says, I want to sell a new type of candy bar  
22 with a special, you know, secret menu to it, we can  
23 evaluate what the marketplace for candy bars are.  
24 But the unions are not offering this to  
25 others and the Fund's need for this information is

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1 that impact the analysis you provided in your report?  
2 A And what I think you're saying is that they  
3 thought the fee was originally fine but it may not be  
4 fine in more recent years.

5 Q Yes.

6 A Well, we still have to deal with the issue of  
7 whether the Fund gets to continue to use the data that  
8 they put in a large database. You had asked me about  
9 that earlier and I predicted a possible dispute if the  
10 Fund wants to take that position. But the deal wasn't  
11 arranged -- well, look, the answer to that is, I -- I  
12 don't know their state of mind. And if someone wants  
13 to renegotiate the deal, they, I suppose, could do  
14 that.

15 Q Did you give any consideration in your report  
16 to the potential for new competition in the market?

17 A Well, you haven't described in your question  
18 what this new competition is. I suspect that you're  
19 referring to more digital formulations of music that  
20 may not require what has in the past been more  
21 traditional approach. And I -- I am aware of that.  
22 You'll note that the data in my tables shows  
23 information by year so that one can see the extent, if  
24 at all, that trends have changed.

25 Q And I think you say in your report, on

<p style="text-align: right;">Page 202</p> <p>1 page 20, "For recently-produced digital music, there 2 are fewer artists to discover."</p> <p>3 Is that what you are referring to?</p> <p>4 A I'm -- I'm sorry, I -- I don't know to which 5 you're referring, but that -- that does not 6 necessarily surprise me. I probably do say it, but I 7 wasn't following your language.</p> <p>8 Q Okay. If I represent to you that the union 9 pension funds have a more accurate and complete 10 repository of the same information that the unions do, 11 would that alter your analysis?</p> <p>12 A If the union pension funds are providing that 13 information to the Fund, sure, I suppose, if you could 14 get the information from another source and it's more 15 reliable or more accurate, then -- and the -- and the 16 pension funds want to act in competition to the 17 unions, you know, that -- that -- I don't know what 18 that impact is.</p> <p>19 I -- I did not consider the possibility that 20 the pension funds would -- would do what you just 21 suggested. In fact, you didn't say they'd do it 22 either. You just gave me a hypothetical, well, if the 23 information exists.</p> <p>24 Maybe -- maybe another way of answering the 25 question is, the fact that the information exists</p>	<p style="text-align: right;">Page 204</p> <p>1 A Are you asking me why the parties agreed to 2 3 percent?</p> <p>3 Q No. Why do you think a 3 percent fee is 4 reasonable as opposed to a different number?</p> <p>5 A Well, 3 percent was the fee that I was asked 6 to evaluate the reasonableness of. The parties had 7 agreed to that 3 percent fee years before I was 8 employed.</p> <p>9 Q Would a 4 percent fee be reasonable?</p> <p>10 A That was not my assignment and not the deal 11 so I didn't conduct an assignment based on 4 percent.</p> <p>12 I conducted an assignment based on 3 percent.</p> <p>13 Q Okay. As used here in conclusion number 3, 14 does reasonable refer to reasonable from the Fund's 15 perspective or reasonable from the unions' 16 perspective?</p> <p>17 A Okay. Now I -- I really should follow your 18 question because you've -- you're quoting something 19 specific and I don't know what you're quoting. I'm 20 not quarreling with it. I just -- I just don't know 21 where you are. You say number 3.</p> <p>22 Q Yeah.</p> <p>23 A What page?</p> <p>24 Q Page 13.</p> <p>25 A 13:</p>
<p style="text-align: right;">Page 203</p> <p>1 doesn't matter. The information that matters is, is 2 can you actually get it. And so what -- what I 3 actually added in the answer I just gave that the 4 pension funds might actually cut a deal to do that and 5 if that were the case, then -- then I'd have a new 6 piece of information to consider.</p> <p>7 Q Okay. So your -- let's find it first. Hold 8 on.</p> <p>9 Okay. If you look on page 13 of your report 10 where you have your "Summary of Conclusions."</p> <p>11 Conclusion number 3 says, "Multiple economic 12 factors relating to the attributes and use of the 13 unions' data support the reasonableness of the 14 3 percent fee."</p> <p>15 Based on your analysis of the Georgia-Pacific 16 factors, isn't it more accurate to say that the 17 3 percent fee is not unreasonable?</p> <p>18 A Yeah, I don't know -- maybe -- I don't know 19 if it's important or not, but I -- I was not following 20 your starting point for that question. But -- so 21 putting aside the first part that I didn't follow, 22 your question is, was my conclusion that the fee was 23 not unreasonable. That is not my conclusion. 24 Although that conclusion would also be true.</p> <p>25 Q Okay. Would a -- why 3 percent?</p>	<p style="text-align: right;">Page 205</p> <p>1 Q Summary of conclusions number 3.</p> <p>2 A Okay. I am looking at the fee as to what 3 would occur between a negotiation from the -- between 4 the union and the Fund with both parties acting 5 reasonable. It is not an amount of money -- by the 6 way, this comes up in every single reasonable royalty 7 engagement. This is not the fee that anybody wants to 8 pay. It's not the fee that the Fund would want to pay 9 or the union would want to receive. It is a fee that 10 would be reasonably negotiated between two parties who 11 are cooperating and willing to do a transaction. So 12 it's from both of their perspectives.</p> <p>13 Q Would it be accurate to say that your 14 analysis in this case would not be transferable to any 15 other percentage figure?</p> <p>16 MR. THOMAS: Objection to the form.</p> <p>17 THE WITNESS: I -- I think what you're asking 18 me is could you take this same report and replace the 19 3 percent with a different number?</p> <p>20 BY MS. McCONNELL:</p> <p>21 Q Yeah.</p> <p>22 A I would not encourage you to do that. So, 23 for example, I've not concluded that the fee of 24 15 percent would be reasonable. And that's what I 25 think you just asked me. Can you -- can you</p>

<p style="text-align: right;">Page 206</p> <p>1 substitute a new number, and the answer is no, you 2 can't substitute a new number. The engagement was 3 done based on 3 percent. 4 Now, if someone said they wanted 2 percent, 5 that would be an easy discussion, nobody would -- you 6 know, nobody on the plaintiff side would disagree with 7 the 3 percent turning into 2 percent. But I certainly 8 would not allow anyone to use my report by increasing 9 that number. 10 Q Is it your opinion that a percentage-based 11 fee is in the best interest of the beneficiaries of 12 the Fund? 13 A When you say "best interest," that probably 14 implies some sort of a legal standard and I would want 15 to make sure I understood what that legal standard 16 was. I don't quarrel with the idea that one could 17 change the manner in which this fee were calculated 18 and if you did change the manner in which the fee was 19 calculated, there might be winners and losers. 20 Let's -- let's say someone said that we want 21 you to charge X amount of dollars or cents per 22 participant as a direct deduction from their check. 23 Even if the fee remained identical, the allocation of 24 that fee would change. The people with larger checks 25 would pay a proportionately smaller amount. The</p>	<p style="text-align: right;">Page 208</p> <p>1 on a percentage basis. And I have no quarrel with 2 that. 3 Q If you look back on page 13 for number 3, you 4 say, "See Section C below." 5 And then if you look at Section C, those are 6 the Georgia-Pacific factors? 7 Is there anything -- 8 A Yes, ma'am. 9 Q Is there anything in those Georgia-Pacific 10 factors that specifically looks to 3 percent as 11 opposed to any other percentage? 12 MR. THOMAS: Objection; vague. 13 THE WITNESS: Yes, there are. You may not 14 see them directly. I mean, if you want I'll go 15 through this. It will be -- end up being tedious. 16 But every time I refer to earlier sections of 17 the report, what I'm referring to are tables and data 18 assemblages that exist earlier in the report that are 19 being incorporated by reference in the Georgia-Pacific 20 factors. And that's how it occurs. 21 BY MS. McCONNELL: 22 Q But which tables discuss 3 percent as the 23 appropriate percentage as opposed to a different 24 percentage? 25 A Well, I don't know that there's any tables</p>
<p style="text-align: right;">Page 207</p> <p>1 smaller participants would pay proportionately a 2 greater amount. You have winners and losers. And 3 that -- that's simply a matter of the math. 4 I'm suggesting that 3 percent in total was 5 reasonable. I've put aside the fact that if you 6 denominated a fee in some other way you might -- you 7 would get a different answer perhaps. And I say 8 different answer, I mean different answer when applied 9 to an individual participant. 10 Q And when you say denominated a fee in some 11 other way, are you including like a flat fee? 12 A Well, it -- it would include that. And so 13 the example I just gave, in fact, was a flat fee. So 14 if someone says, we want to charge -- I'm going to 15 make up a number. This has nothing to do with 16 reality -- but every check that gets cut takes a 17 deduction of \$1 for -- that it's paid to the union for 18 the rights of their -- their information. 19 There'd be winners and losers under that 20 arrangement. And by virtue of there being winners and 21 losers, I'll let someone else figure out if that's in 22 the best interest of the group as a whole. I'm 23 relating the fee in total, not how it's allocated to 24 individual participants. I understand the way it's 25 allocated to individual participants is on a per -- is</p>	<p style="text-align: right;">Page 209</p> <p>1 that -- that say if it's -- in fact, there are no 2 tables that say if it's 4 percent, here's how this 3 would change. I told you that the 3 percent was part 4 of the definition of the assignment. So all of the 5 work was done with that starting definition of the 6 assignment. 7 Q Can you identify any specific areas of your 8 report that would no longer be accurate if the 9 3 percent figure was changed to a higher figure? 10 A Well, the actual raw data might not change -- 11 actually, that's not true. There are places where -- 12 where I do percentage comparisons. So, for example, 13 this is just an example, it's not the entire thing. 14 Table 2, there is a column for the union fee 15 as a percent of total administrative costs. Well, if 16 the fee were larger, those percentages would change. 17 That's -- that's not the only example, but that is an 18 example of a table that is specifically impacted by 19 the 3 percent amount. 20 Q Are any of the Georgia-Pacific factor 21 analysis tied to 3 percent as opposed to any other 22 percent? 23 MR. THOMAS: Objection; asked and answered. 24 THE WITNESS: The entire assignment was tied 25 to 3 percent, so -- I thought I had told you that</p>

<p>1 before.</p> <p>2 BY MS. McCONNELL:</p> <p>3 Q If you were advising the Fund about whether 4 to enter into an agreement with an unrelated third 5 party, how much would you advise them to spend on the 6 data?</p> <p>7 MR. THOMAS: Objection; calls for 8 speculation, outside the scope.</p> <p>9 THE WITNESS: You are asking me to speculate 10 because I wasn't there at the time. I wasn't 11 negotiating with the unions. And I don't know -- 12 yeah, I -- look, at the risk of being obvious, the 13 Fund would want to pay as little as possible and 14 unions would want to be paid more. That's no 15 different than the existence of the -- how buyers and 16 sellers behave all the time.</p> <p>17 So in your hypothetical where I'm 18 representing the Fund, the question is, you know, 19 could we try to get the unions down. And I've not 20 done that assignment and I wasn't there at the time 21 and I do think it would be speculating for me -- to 22 ask me to assume that I was, you know, you know, there 23 eight years ago, or whatever it was, when I wasn't.</p> <p>24 BY MS. McCONNELL:</p> <p>25 Q After doing the research for this report have</p>	<p>Page 210</p> <p>1 Q Have you analyzed how much it would cost for 2 the Fund to replicate the unions' data?</p> <p>3 A Well, that's -- that's the whole problem. 4 They can't. This -- that's why I told you earlier, 5 this is not a cost-based decision, and when you tried 6 to make it a cost-based decision, I twice, in two 7 different questions, told you that that's not the 8 basis for the conclusion.</p> <p>9 The basis of the conclusion is, the union 10 simply -- I mean, I'm sorry, the Fund simply can't do 11 its job accurately unless it has this data. And until 12 they solve that problem -- you know, this is -- this 13 is not a cost-based problem. It's an accuracy-based 14 problem.</p> <p>15 Q You told us earlier you're -- you don't know 16 if the record labels would be willing to sell the 17 data, right?</p> <p>18 A No, I don't know that I told you that. I 19 told you that there's been no evidence in this case, 20 of which I'm aware, that suggests that they would.</p> <p>21 Now, I am well aware that your experts, 22 multiple experts, have asserted that this information 23 is available free of charge. That has not been 24 supported by any evidence in the record. It's not 25 been supported by any footnotes. There's been no</p>
<p>Page 211</p> <p>1 you been able to put together any sort of advice on 2 how much the Fund should pay for this data?</p> <p>3 A The Fund is paying 3 percent. If Fund wishes 4 to continue to use that data, the Fund believes that 5 it would be a travesty for them to stop using the 6 data, and my report and the work of the Fund 7 demonstrates aptly that the accuracy of the payments 8 would be disastrously impacted if the unions' data 9 weren't being used.</p> <p>10 So I think with that background in mind your 11 starting point is, what would I suggest the Fund do, 12 and the answer is, I think you ought to continue with 13 the deal you have because you're apparently pretty 14 happy with it.</p> <p>15 Q Are you aware of any facts to indicate that 16 the unions would refuse to accept a lower percentage 17 than 3 percent?</p> <p>18 A I don't know that I have facts one way or the 19 other. I don't know whether that's been attempted 20 recently.</p> <p>21 Q Have you analyzed -- oh, sorry, were you 22 done?</p> <p>23 A Yeah, I just -- I -- I -- I don't know. I 24 mean, if -- at some point maybe people want to try to 25 renegotiate the arrangement.</p>	<p>Page 213</p> <p>1 details given other than a bald assertion that that 2 was the case. And so I -- I don't know that -- I'm 3 not aware of these labels being willing to do that. 4 If you think they can, or your experts think they can, 5 it would be helpful to provide more details.</p> <p>6 Q Have you looked into whether the record 7 labels are willing to sell the data or not?</p> <p>8 A What I did instead, which is maybe a way of 9 saying yes, is that I asked the folks at the Fund 10 whether this is something that they've considered, and 11 they said absolutely, and we cannot get the same sort 12 of information from the record labels. If we could 13 get it cheaper, then we'd have a basis for some 14 alternatives that are currently not in front of us.</p> <p>15 They specifically said, and this is not 16 surprising, that the labels simply don't have a need 17 to keep this information for the long historical 18 periods that are needed here. And -- and that would 19 not surprise me. For the reason the record labels 20 kept the information, keeping this data for these 21 very, very long periods of time would be out of -- it 22 would be unusual and out of the ordinary.</p> <p>23 Q You mentioned that you asked the folks at the 24 Fund whether they've looked into whether the record 25 labels sell the data. Who are the folks at the Fund</p>

1 that you spoke to?

2 A You know, a lot of conversations merge  
3 together so I could be wrong on this, but I believe  
4 that conversation occurred in one in which Ms. Taub  
5 and Ms. Sandell were involved. But I -- I could be  
6 wrong.

7 Q Have you -- well, strike that.

8 Couldn't the Fund implement an  
9 electronic-type system at the type of recording to  
10 collect session data for all tracks recorded in 2021  
11 and going forward?

12 A You're asking me whether such a system is  
13 technologically feasible?

14 Q Yeah.

15 A I suspect it is.

16 Q In the course of preparing your report did  
17 you consider what the cost of doing something like  
18 that would be for the Fund?

19 A I did consider that.

20 Q Okay. How much do you think a system like  
21 that would cost?

22 A Well, I don't have a number. I do know that  
23 there's an issue of -- of basically investment  
24 capital, that such a system would likely cost  
25 millions. I don't have an exact number. But it's --

1 participation and not others?

2 A That is exactly not what the Fund is doing.

3 The Fund is not taking money from one group of  
4 participants to pay for future generations. They are  
5 instead saying a percentage reduction is reasonable  
6 and appropriate because it significantly improves the  
7 accuracy of the information and is a modest charge  
8 relative to the rest of the amounts that are  
9 appropriately being charged to these participants.

10 It is a pay-as-you-go system, which is  
11 exactly the opposite of, let's invest millions of  
12 dollars of someone else's money that -- of the current  
13 participants' money so that future generations could  
14 impact it.

15 Look, if Mr. Risto wants to personally fund  
16 this, I think he should talk to the Fund. But I'm  
17 quite sure that Mr. Risto doesn't want to personally  
18 pay for it, and I don't know anybody else that's  
19 waiting in that line.

20 Q I don't know -- I don't know -- know why  
21 you're including that in your answer because I'm not  
22 sure --

23 A Because it's relevant. I'll --

24 Q No, it's not.

25 A -- tell you why, because it's absolutely

1 it's -- this is not petty cash. And so who's going to  
2 pay for it.

3 The Fund is effectively a passthrough  
4 vehicle. It gets money and it's supposed to pay that  
5 money to others. I don't think there's a provision  
6 where the Fund gets to say, you know what we'd like to  
7 do, I'm sure you guys won't mind, we're going to take  
8 multiple millions of your dollars and we're just not  
9 going to give it to you, and the reason we're not  
10 going to give it to you is we're going to invest in  
11 this really slick computer system, you'll love it, and  
12 the guys later who aren't getting -- who aren't  
13 participating right now, they're going to like it a  
14 lot because it will save money later and you're going  
15 to pay for it now.

16 I don't want to be the one responsible for  
17 that recommendation because that would -- that would  
18 be generating your next lawsuit. And so I don't know  
19 how the Fund's going to do that. It -- it may be  
20 technologically feasible but that does not mean it's  
21 practical.

22 Q Isn't that what the Fund is doing now, giving  
23 \$1.5 million approximately per year to the unions for  
24 maybe data that goes back to 1940 that you've shown us  
25 helps some people get their participant --

1 relevant. You want to know why I'm telling you?

2 Because it is absolutely relevant to this. You said,  
3 isn't this the same, and the answer is, it is nowhere  
4 close to the same. This is night-and-day difference.  
5 Night and day are not the same. They might both  
6 involve you, the Earth, but that doesn't make them the  
7 same.

8 And the notion of pay-as-you-go now is not  
9 the same as taking millions of dollars from people now  
10 to benefit future people that haven't yet been  
11 identified. And if you think they're the same, fine,  
12 I'm not going to be able to convince you.

13 Q No, that's fine, I --

14 A Because they're not the same. And that  
15 was -- and that was the question you asked, aren't  
16 these the same.

17 Q I'm just wondering where you are got into  
18 attacking Mr. Risto in that answer.

19 A I'll tell you why. Because someone has got  
20 to fund this millions of dollars and the guy who is  
21 proposing that is you through Mr. Risto. So if -- you  
22 know, if Mr. Risto thinks it's a great idea to spend  
23 millions of dollars, go ahead and propose it to the  
24 Court, I guess, but I don't know who's going to pay  
25 for it.

1 Q Don't you agree that the fee continues to get  
2 paid to identify future beneficiaries?  
3 A You said -- I think your question misstated,  
4 but I think what you meant is the Fund gets paid.  
5 And, yes, the Fund continues to get paid, the research  
6 efforts continue. I summarize those efforts in my  
7 report.

8 Q No, I -- I don't think so.

9 So the service fee continues to get paid so  
10 that the unions can provide session reports for future  
11 payments; isn't that right?

12 A No.

13 Q Okay.

14 A I mean, look, they may benefit the future,  
15 too. I mean, once the information's in the database,  
16 the Fund does not have to do it again. But the  
17 research efforts are being done in response to monies  
18 being received now that have to be distributed now.

19 Q Okay. I'd like to show you a section of  
20 Mr. Crabtree-Ireland's deposition that was taken in  
21 the Blondell case.

22 MS. McCONNELL: Nico, if you can put it up,  
23 please, on the screen.

24 Okay. Mr. Crabtree-Ireland was asked, "Was  
25 the intent for this to just recoup the unions' cost or

1 not looked at the unions' financial statements, and I  
2 don't know if this information's available but I -- it  
3 would not surprise me that the fee being paid to the  
4 unions is not necessary to reimburse for current  
5 period incremental cost. And I've never suggested  
6 that in my report.

7 However, the only thing I'm adding is that  
8 this cost exercise should not be done on a single year  
9 even under Mr. Crabtree-Ireland's answer.

10 BY MS. McCONNELL:

11 Q Do you believe that the services fee as  
12 currently structured is profitable for the unions?

13 MR. THOMAS: Same objections.

14 THE WITNESS: Well, the -- the word  
15 "profitable" -- I'm an accountant and -- and -- by  
16 training and so I -- I know that different people use  
17 the words "profits" in different ways. And we would  
18 need to clarify what we mean by profits in order to  
19 give an appropriate and complete answer to your  
20 question.

21 I mean, you know, you'd get a different  
22 answer if you address it year by year versus beginning  
23 of time. You'd get a different answer on whether you  
24 use incremental versus some fully loaded cost measure.  
25 The bottom line, though, is, I haven't done any of

1 for this to actually be a profitable, you know, for  
2 the unions to make a profit on this?"  
3 And his answer is, "Oh, God, no. It was to  
4 recoup the unions' costs, recognizing that these might  
5 fluctuate and, you know, fairly significantly  
6 depending upon the demand from the Fund for  
7 information and not wanting to spend a whole bunch of  
8 time and money on tracking that in a very granular  
9 way.

10 "So the intention was to come up with away  
11 that would, you know, reasonably track the costs, not  
12 generate revenue for the union, but also not have the  
13 union subsidizing the operation of the Fund through  
14 the services that they were providing to the Fund."

15 Q Do you think that the service fee as  
16 currently structured merely recoups the unions' costs?

17 MR. THOMAS: Objection; lacks foundation,  
18 outside the scope.

19 THE WITNESS: I have not done such a  
20 calculation. To do that calculation properly, one  
21 would need to go back to the very beginning of the  
22 earliest session reports that were generated. One  
23 would need to address the storage and archival costs.  
24 It would be a very difficult assignment.

25 Now, in terms of the current periods, I've

1 those calculations.

2 BY MS. McCONNELL:

3 Q Other than incremental cost, what other ways  
4 of doing a profitability analysis are there?

5 A Well, look, the only reason I mention  
6 incremental cost is because that's what your experts  
7 and -- and your -- your motions have suggested. No  
8 one actually does accounting on incremental cost in  
9 that fashion. So if you ask an accountant, was this  
10 profitable or not, no one who's -- is -- who's  
11 competent is going to say, well, on incremental basis  
12 it's profitable. I mean -- so accountants typically  
13 are using fully loaded costs when they answer that  
14 question.

15 Q What does that mean? What does "fully loaded  
16 costs" mean?

17 A It's what any -- well, just so you  
18 understand, if you got -- never mind. You don't have  
19 any experts on accounting. All right. Never mind.  
20 I'm sorry. I was going to refer you to your experts,  
21 but I guess that won't work.

22 Q I have you here.

23 A Never mind. Never mind. Never mind. Forget  
24 it. I'm -- I'm sorry.

25 Here's what it means. When you're looking at

1 fully absorbed costs, it's the -- the opposite of  
 2 incremental costs. It is looking at activities and  
 3 allocating costs to that activity for those costs that  
 4 benefit those activities. So the issues generally  
 5 comes up of one of overhead.  
 6 So to fully absorb -- to -- to produce fully  
 7 absorbed costs you have to take overhead and allocate  
 8 it to whatever the underlying production or activity  
 9 is.

10 You also have an issue of what time periods  
 11 are involved. If you're dealing with incremental  
 12 costs, you can narrow that down to a very, very thin  
 13 sliver of time, but of course nobody who's a real  
 14 accountant would do that. What they do instead is  
 15 they would look at the entire period of time that --  
 16 that generated activities of for which -- or -- or  
 17 that contributed to whatever it is that you're talking  
 18 about.

19 So, for example, if you're looking at session  
 20 reports, you'd say, okay, during what period of time  
 21 were the session reports being generated. And the  
 22 answer is, well, they go back to the beginning of the  
 23 union. And they say, well, okay, then that's the  
 24 relevant period of time to address the costs. And you  
 25 have to address the overhead during that entire

1 period.  
 2 So it's a very long-running analysis that  
 3 looks at total costs, which is the exact opposite of  
 4 the incremental costs that some of your experts have  
 5 suggested.

6 Q How do you take into account the fact that  
 7 the unions were performing these activities for their  
 8 own purposes since the beginning of time?

9 A Well, the way I've accounted for it is by  
 10 treating it as a piece of information that needs to be  
 11 reasonably compensated for the value that it delivers.  
 12 It is not a cost-based analysis. I've never suggested  
 13 it was. I was answering your questions, but just  
 14 because I was answering a question didn't mean I was  
 15 suggesting you do that.

16 Q So if you were going to do a fully absorbed  
 17 cost analysis and you said you go back to the  
 18 beginning of the union, looking at overhead costs, I'm  
 19 saying, how then do you factor in the fact that the  
 20 unions have been collecting this information for their  
 21 own purposes since the beginning of the union?

22 A Look, look, at some point there's a limit to  
 23 how far we should go down this rabbit hole. What I  
 24 really told you is that no one, no one means no one,  
 25 no one competent uses costs as the basis for valuing

1 intellectual property. And I would not -- I have  
 2 never valued intellectual property -- with only one  
 3 exception, which I can go through if you want. With  
 4 that one exception, which I'm happy to discuss with  
 5 you, I never valued intellectual property based on  
 6 costs, and I've never seen any competent appraiser  
 7 value intellectual property based on cost.

8 So when you talk about, well, how do you do  
 9 this, you make it sound like there's a methodology for  
 10 something that doesn't happen. No one competent does  
 11 what your -- what your question presupposes. And so  
 12 the answer is, you don't do it.

13 Q We -- we started this, your words, rabbit  
 14 hole because we were talking about how do you figure  
 15 out if something is profitable or not, and you said  
 16 can look at the amount that is brought in for -- for  
 17 the data as opposed to the fully loaded costs.

18 And what I gathered was fully loaded costs  
 19 include overhead, right?

20 A Look, look, the only reason you -- I was  
 21 talking about fully loaded costs is because it's in  
 22 contrast to incremental costs. Incremental costs is  
 23 wrong even if you wanted to base it on cost.

24 Now, I'm not suggesting you base it on cost.  
 25 I'm suggesting just the opposite. But if for some

1 reason someone says no, no, no, you really, really,  
 2 really got to do it on cost, then you have to do  
 3 something that no one, including the plaintiffs'  
 4 experts have done in this matter. You cannot base it  
 5 on incremental costs. You have to base it on fully  
 6 loaded costs.

7 I'm not suggesting -- and then you started  
 8 asking me, you know, how do you get around this  
 9 problem or that problem on fully loaded costs and how  
 10 have you done it in the past, I don't do this on past  
 11 assignments. You're not supposed to do it at all.

12 Q If we are to assume that the parties to the  
 13 services agreement are only allowed to incur  
 14 reasonable incremental costs, does the agreement meet  
 15 that standard?

16 THE WITNESS: Madam Reporter, would you  
 17 reread that question again?

18 (Record read.)

19 THE WITNESS: I don't understand your  
 20 question. I mean, that's not what the agreement says  
 21 and when you say they're only allowed to incur  
 22 incremental costs, that states a predicate that is not  
 23 possible.

24 BY MS. McCONNELL:

25 Q If the Copyright Act only allows the parties

1 to this case to incur reasonable incremental costs,  
2 does the services agreement meet that standard?  
3 MR. THOMAS: Objection; that calls for a  
4 legal conclusion.  
5 THE WITNESS: Well, that is not my  
6 understanding. But nevertheless, I have not expressed  
7 any legal opinions. My opinions instead are what  
8 would be a reasonable cost. It is not a reasonable  
9 incremental cost. I've told you that that would be  
10 wrong. I can spend as much time as you want  
11 explaining why.

12 BY MS. McCONNELL:

13 Q Well, I just want to clarify --

14 A And if -- if you're saying that the law says  
15 you need to do it wrong, then I'd say, boy, that's  
16 surprising because normally people who write laws  
17 aren't that stupid.

18 Q We -- in your answer you said your opinions  
19 are what would be a reasonable cost, but your opinions  
20 are what would be a reasonable value, right?

21 A You know what, that -- that's fair. But --  
22 and I -- and I use the word "cost" in probably a  
23 shorthand way. I would invite your attention to the  
24 description of the assignment, and it's articulated,  
25 is the reasonable amount the funds pay. And I

1 shorthanded that to a reasonable cost of what the Fund  
2 is paying. And -- and if that was confusing to you,  
3 you have my apologies.

4 MS. McCONNELL: Okay. Let's take a break.

5 Ten minutes.

6 MR. THOMAS: Okay.

7 THE VIDEOGRAPHER: We are now going off the  
8 record, and the time is 3:43 p.m.

9 (Recess.)

10 THE VIDEOGRAPHER: We are now going back on  
11 the record, and the time is 3:55 p.m.

12 BY MS. McCONNELL:

13 Q Have you performed evaluation of the services  
14 purportedly provided by the unions to the Fund?

15 A Ms. McConnell, I want to answer that  
16 question, and I promise you I will, but I -- I didn't  
17 want to -- there was something I wanted to alert you  
18 to and I'm worried that I'm going to forget a second  
19 time.

20 There was an answer that I gave that  
21 accurately and honestly reflected my state of mind,  
22 but Mr. Sullivan said that it was not factually  
23 accurate and -- so because it's not factually  
24 accurate, even if it was my state of mind, I want to  
25 make certain that it is fixed.

1 It involves the footnote 12 involving how the  
2 samples were actually selected. And I gave you my  
3 understanding and I -- this footnote comes from  
4 Ms. Sandell's description of it. But I'm told that  
5 this may not have been artfully expressed, maybe by  
6 me, maybe by Ms. Sandell.

7 But in any event, the -- what Ms. Sandell  
8 really did was take the first 50 transactions from  
9 what she considered a random starting point. So my  
10 answers involving the existence of the highest 50  
11 transactions from a group of 100 is actually not what  
12 Ms. Sandell did. At least that's what Mr. Sullivan  
13 told me. And so I wanted to correct that because I  
14 want you to have accurate information.

15 Q Okay. And again, you were not directing the  
16 step-by-step process for conducting this 50-song  
17 sample, right?

18 A Correct.

19 Q Okay. And now you're saying that  
20 Ms. Sandell -- strike that.

21 How were the 5,992 titles ordered?

22 A By dollar amount. There was no change in  
23 that.

24 Q Okay.

25 A The only change is that instead of saying

1 I've got this starting point and I'm going to take 50  
2 of the next highest 100 -- the 50 highest of the next  
3 100, it really should have been, I just took the next  
4 50.

5 Q Okay. Got it.

6 Okay. So my question was, have you performed  
7 an evaluation of the services purportedly provided by  
8 the unions to the Fund?

9 A I'm not sure I know what you mean.

10 MR. THOMAS: I'm going to object to the form  
11 as vague.

12 But go ahead.

13 MS. McCONNELL: Okay.

14 Q So are you aware that in the services  
15 agreement there's -- I'll call them two categories of  
16 things purportedly being provided by the unions to the  
17 Fund. There's the data, which includes session  
18 reports, B-forms and membership date. And then  
19 another classification of services which includes the  
20 represent -- quote, representation of fund interests  
21 of different performing rights societies.

22 Were you aware of that?

23 A Okay. You're asking about the services?

24 Q Correct.

25 A I'm aware of the services. I identify the

<p style="text-align: right;">Page 230</p> <p>1 services in my report. I have not attributed any 2 explicit value to those services.</p> <p>3 Q Okay. We've talked now about the four 4 conclusions that are on page 13.</p> <p>5 Are there any other conclusions that we 6 haven't talked about today?</p> <p>7 A Well, we've talked about my report, and 8 everything I have is in my report.</p> <p>9 Q Okay. And for the bases of your opinions, 10 everything you have is in your report, correct?</p> <p>11 A Yes, I believe so. And -- and specifically 12 the portion of Rule 26 that I think you were referring 13 to is Roman numeral XII -- II, which is on page 1.</p> <p>14 Q Just to confirm.</p> <p>15 If you haven't done a valuation of the 16 services portion of the services agreement, it's your 17 opinion that the data exchange portion of the services 18 agreement is worth the 3 percent; is that correct?</p> <p>19 A Yes, I'm not suggesting that the unions don't 20 have to do the services, and I'm not suggesting that 21 the services do not have value. I am simply saying I 22 had -- I did not explicitly put extra value on the 23 services so that they were kind of like an additional 24 thing that was helpful to the Fund, but the conclusion 25 is not based on those services.</p>	<p style="text-align: right;">Page 232</p> <p>1 with that?</p> <p>2 THE WITNESS: Mr. Thomas, I think that was 3 directed to you because I --</p> <p>4 MR. THOMAS: Well, I think it was -- it might 5 have been directed to you in the first instance, 6 whether that's a sufficient amount of time for you.</p> <p>7 It's acceptable to me. We've done it on the all the 8 depositions. If that gives you enough time to review 9 it, then it's fine by me.</p> <p>10 THE WITNESS: That's fine. I'll -- I'll do 11 whatever the -- the circumstances of this case desire.</p> <p>12 MS. McCONNELL: All right.</p> <p>13 THE VIDEOGRAPHER: Okay. This concludes the 14 video deposition of David Nolte. We are now going off 15 the record, and the time is 4:03 p.m.</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 231</p> <p>1 Q Understood.</p> <p>2 MS. McCONNELL: Okay. I am finished with 3 your deposition. I obviously cannot make a big show 4 of handing you a check at the end of deposition like 5 maybe you would have done over a year ago but I have 6 your W9 and I will get a check sent to you for your 7 \$625 an hour for 7 hours; is that fair?</p> <p>8 THE WITNESS: Yes, that's fine. Thank you.</p> <p>9 MR. THOMAS: Yeah, I think we're right at 10 sort of 7 hours total time and that's -- that's fine 11 and -- and we'll calculate it the same way for yours, 12 Mariana, so that will work fine.</p> <p>13 MS. McCONNELL: Perfect.</p> <p>14 On the record, or whatever, Mr. Nolte, if you 15 wanted to send me wire instructions to pay you, that 16 would be faster obviously than me sticking a check in 17 the mail or FedEx so it's up to you and your counsel 18 but let me know. You can shoot me an e-mail.</p> <p>19 THE WITNESS: You know, First-Class Mail is 20 fine. I don't want to put you through the extra cost 21 of going through that. So just -- just go -- go send 22 it via Express mail and -- and I appreciate that.</p> <p>23 MS. McCONNELL: Okay. We've been doing 24 30 days to review and then 10 days for your counsel to 25 notify us of any corrections. Do you have any issue</p>	<p style="text-align: right;">Page 233</p> <p>1 DECLARATION UNDER PENALTY OF PERJURY</p> <p>2</p> <p>3 I, DAVID NOLTE, do hereby certify under 4 penalty of perjury that I have read the foregoing 5 transcript of my deposition taken on Tuesday, 6 April 27, 2021; that I have made such corrections as 7 appear noted herein in ink, initialed by me; that my 8 testimony as contained herein, as corrected, is true 9 and correct.</p> <p>10</p> <p>11 Dated this _____ day of _____, 2021, 12 at _____.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17 DAVID NOLTE</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

<p style="text-align: right;">Page 234</p> <p>1 DEPOSITION ERRATA SHEET</p> <p>2</p> <p>3 Page No._____ Line No._____</p> <p>4 Change:_____</p> <p>5 Reason for change:_____</p> <p>6 Page No._____ Line No._____</p> <p>7 Change:_____</p> <p>8 Reason for change:_____</p> <p>9 Page No._____ Line No._____</p> <p>10 Change:_____</p> <p>11 Reason for change:_____</p> <p>12 Page No._____ Line No._____</p> <p>13 Change:_____</p> <p>14 Reason for change:_____</p> <p>15 Page No._____ Line No._____</p> <p>16 Change:_____</p> <p>17 Reason for change:_____</p> <p>18 Page No._____ Line No._____</p> <p>19 Change:_____</p> <p>20 Reason for change:_____</p> <p>21</p> <p>22</p> <p>23 _____</p> <p>24 DAVID NOLTE                      Dated _____</p> <p>25</p>	<p style="text-align: right;">Page 235</p> <p>1 CERTIFICATE</p> <p>2</p> <p>3 I, SHARI BOLTON, Certified Shorthand</p> <p>4 Reporter, No. 9291, do hereby certify that prior to</p> <p>5 the commencement of the examination, the Deponent was</p> <p>6 duly remotely sworn by me to testify to the truth, the</p> <p>7 whole truth and nothing but the truth.</p> <p>8</p> <p>9 I DO FURTHER CERTIFY that the foregoing is a</p> <p>10 verbatim transcript of the testimony as taken</p> <p>11 stenographically by me at the time, place and on the</p> <p>12 date hereinbefore set forth, to the best of my</p> <p>13 ability.</p> <p>14</p> <p>15 I DO FURTHER CERTIFY that I am neither a</p> <p>16 relative nor employee nor attorney nor counsel of any</p> <p>17 of the parties to this action, and that I am neither a</p> <p>18 relative nor employee of such attorney or counsel, and</p> <p>19 that I am not financially interested in the action.</p> <p>20</p> <p>21 _____</p> <p>22 SHARI BOLTON</p> <p>23 Certified Shorthand Reporter, No. 9291</p> <p>24</p> <p>25 Dated:_____</p>
--	---

# **EXHIBIT 4**

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<sup>12</sup> Attorneys for Plaintiff and the Class

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

17 KEVIN RISTO, on behalf of himself  
18 and all others similarly situated,

19 Plaintiff,

20 | v.

21 SCREEN ACTORS GUILD-  
22 AMERICAN FEDERATION OF  
23 TELEVISION AND RADIO  
24 ARTISTS, a Delaware corporation;  
25 AMERICAN FEDERATION OF  
26 MUSICIANS OF THE UNITED  
27 STATES AND CANADA, a California  
28 nonprofit corporation; RAYMOND M.  
HAIR, JR, an individual, as Trustee of  
the AFM and SAG-AFTRA Intellectual  
Property Rights Distribution Fund;  
TINO GAGLIARDI, an individual, as  
Trustee of the AFM and SAG-AFTRA  
Intellectual Property Rights Distribution  
Fund; DUNCAN CRABTREE-

**CASE NO. 2:18-CV-07241-CAS-PLA**  
**CLASS ACTION**

**PLAINTIFF'S FIRST SET OF  
INTERROGATORIES TO  
DEFENDANTS**

1 IRELAND, an individual, as Trustee of  
2 the AFM and SAG-AFTRA Intellectual  
3 Property Rights Distribution Fund;  
4 STEFANIE TAUB, an individual, as  
5 Trustee of the AFM and SAG-AFTRA  
6 Intellectual Property Rights Distribution  
7 Fund; JON JOYCE, an individual, as  
8 Trustee of the AFM and SAG-AFTRA  
9 Intellectual Property Rights Distribution  
Fund; BRUCE BOUTON, an  
individual, as Trustee of the AFM and  
SAG-AFTRA Intellectual Property  
Rights Distribution Fund; and DOE  
DEFENDANTS 1-10,

Defendants.

10 **PROPOUNDING PARTY:** KEVIN RISTO

11 **RESPONDING PARTY:** SCREEN ACTORS GUILD-AMERICAN  
12 FEDERATION OF TELEVISION AND RADIO  
13 ARTISTS, AMERICAN FEDERATION OF  
14 MUSICIANS OF THE UNITED STATES AND  
15 CANADA, RAYMOND M. HAIR, JR, TINO  
16 GAGLIARDI, DUNCAN CRABTREE-IRELAND,  
17 STEFANIE TAUB, JON JOYCE, and BRUCE  
18 BOUTON

19 **SET NO.:** ONE

1                   **TO DEFENDANTS SCREEN ACTORS GUILD-AMERICAN**  
2 **FEDERATION OF TELEVISION AND RADIO ARTISTS, AMERICAN**  
3 **FEDERATION OF MUSICIANS OF THE UNITED STATES AND**  
4 **CANADA, RAYMOND M. HAIR, JR, TINO GAGLIARDI, DUNCAN**  
5 **CRABTREE-IRELAND, STEFANIE TAUB, JON JOYCE, and BRUCE**  
6 **BOUTON AND TO THEIR ATTORNEYS OF RECORD:**

7                   You are hereby requested, pursuant to the Federal Rules of Civil Procedure,  
8 Rules 33, to respond, under oath, to the following set of interrogatories within 30  
9 days. Pursuant to Federal Rule of Civil Procedure Rule 26(e), Defendants have a  
10 duty to supplement or correct any disclosure or response to these Interrogatories in a  
11 timely manner if she learns that any disclosure or response is incomplete or  
12 incorrect.

13                   **DEFINITIONS**

14                   1.       **“ALL”** shall be construed as “any or all” or “each and all,” as the  
15 context requires, so that each Interrogatory shall be construed broadly, rather than  
16 narrowly, to bring within the scope of each Interrogatory that might otherwise be  
17 construed to be outside its scope.

18                   2.       **“BETWEEN”** shall be construed as “between or among,” as the  
19 context requires, so that each Interrogatory shall be construed broadly, rather than  
20 narrowly, to bring within the scope of each Interrogatory that might otherwise be  
21 construed to be outside its scope.

22                   3.       **“CLASS”** refers to the Class definition set forth in the First Amended  
23 Complaint: “All persons and entities, their agents, successors in interest, assigns,  
24 heirs, executors, trustees, and administrators who are and/or were non-featured  
25 musicians and non-featured vocalists.”

26                   4.       **“CLASS MEMBER”** refers to any persons or entities who fall within  
27 the scope of the aforementioned **CLASS**.

28                   5.       **“EACH”** and “every” shall both be interpreted in the most inclusive

1 light and shall include “each and every.”

2       6.     **“FUND”** refers to the AFM and SAG-AFTRA Intellectual Property  
3 Rights Distribution Fund.

4       7.     **“IDENTIFY”** with respect to any Computer System, shall require  
5 YOU to provide: (i) the name of the Computer System; (ii) the operating system on  
6 which the Computer System runs; (iii) the brand, model, configuration, and location  
7 of the server running the Computer System (iv) the dates during which the  
8 Computer System was in operation; and (v) whether the Computer System is  
9 accessible.

10      8.     **“IDENTIFY”** with respect to any individual, shall require YOU to  
11 provide: (i) the person’s full name; (ii) the person’s present or last known residential  
12 address and telephone number; (iii) the person’s present employment position and  
13 business affiliation; and, (iv) the person’s present or last known business address  
14 and telephone number.

15      9.     **“PLAINTIFF”** as used herein shall refer to Plaintiff Kevin Risto.

16      10.    **“ROYALTY”** or **“ROYALTIES”** refers to any monies received by the  
17 AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund that have  
18 been generated by or are attributable to the performances of non-featured musicians  
19 and/or vocalists pursuant to 17 U.S.C. § 114(g).

20      11.    **“SERVICES AGREEMENT”** refers to the Data Purchase and  
21 Services Agreement between the American Federation of Musicians of the United  
22 States and Canada, AFL-CIO-CLC, the Screen Actors Guild – American Federal of  
23 Television and Radio Artists, and the AFM and SAG-AFTRA Intellectual Property  
24 Rights Distribution Fund entered into on or about July 24, 2013, including any later  
25 amendments or modifications thereto or restatements thereof.

26      12.    **“SERVICE FEE”** refers to the 3% payment set forth in paragraph 6 of  
27 the **SERVICES AGREEMENT**.

28      13.    **“TRUST AGREEMENT”** refers to the AFM and AFTRA Intellectual

1 Property Rights Distribution Fund's Agreement and Declaration of Trust entered  
2 into on September 16th, 1998, including any later amendments or modifications  
3 thereto or restatements thereof

4        14.    “UNIONS” as used herein refers collectively to the Screen Actors  
5    Guild-American Federation of Television of Radio Artists (“SAG-AFTRA”) and  
6    American Federation of Musicians of the United States and Canada (“AFM”),  
7    including, as applicable, any predecessor unions.

8        15.    "**YOU**" and "**YOUR**" as used herein shall refer to the Defendant  
9 responding to the request and any of its parents, predecessors, other affiliates,  
10 successors, or subsidiaries, including officers, directors, employees, partners, agents,  
11 consultants, or any other person acting or purporting to act on behalf of such  
12 entities.

## INSTRUCTIONS

14        1. Whenever appropriate, the singular form of a word shall be interpreted  
15 in the plural, or vice versa. All verb tenses shall be interpreted to include past,  
16 present and future tenses. The terms "and" as well as "or" shall be construed either  
17 disjunctively or conjunctively as necessary to bring within the scope of these  
18 Interrogatories any relevant information that might otherwise be construed to be  
19 outside of their scope.

20       2.    **YOU** must provide the factual information responsive to these  
21 interrogatories that is available, even if the information is within the knowledge or  
22 possession of your attorneys. See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 504 (1947)  
23 ("A party clearly cannot refuse to answer interrogatories on the ground that the  
24 information sought is solely within the knowledge of his attorney.")

25       3.     If you elect to respond to any of these Interrogatories by producing  
26 **DOCUMENTS** pursuant to Federal Rule of Civil Procedure 33(d) and any of the  
27 responsive **DOCUMENTS** are available as electronically stored information, such  
28 as, but not limited to, e-mails or spreadsheets, then Defendant requests that **YOU**

1 produce them in a searchable PDF format, or, if spreadsheets, in a Microsoft Excel  
2 format. If the electronically stored information is stored in a voice or sound format  
3 only, then Defendant requests that **YOU** produce it on a CD-ROM or DVD.

4       4. Pursuant to Federal Rules of Civil Procedure Rule 26(e), **YOU** have a  
5 duty to supplement or correct any disclosure or response to these Interrogatories in a  
6 timely manner if Plaintiff learns that any disclosure or response is incomplete or  
7 incorrect.

8       5. None of the interrogatories below is intended to be, or shall be construed  
9 as, an admission of any fact.

10      6. Each Interrogatory shall be answered separately by each **DEFENDANT**.

11      7. If any portion of an Interrogatory response is withheld under a claim of  
12 privilege or other ground, state that it is being withheld and explain why, including a  
13 description of the Information withheld in accordance with Fed. R. Civ. P. 26(b)(5).

14      8. If the answer to all or any part of any Interrogatory is not presently  
15 known or available, include a statement to that effect and furnish any information  
16 presently known or available.

17      9. If any Interrogatory or any part of any Interrogatory cannot be  
18 answered in full, answer to the fullest extent possible with an explanation of why a  
19 complete answer is not provided.

20      10. Each Interrogatory herein shall be answered independently and not with  
21 reference to any other Interrogatory for purposes of limitation.

22      11. These Interrogatories are continuing in nature pursuant to Federal Rule  
23 of Civil Procedure 26(e), and therefore require **YOU** to furnish supplemental  
24 responses whenever **YOU** discover additional facts responsive to the Interrogatories.

## INTERROGATORIES

### INTERROGATORY NO. 1:

27      **IDENTIFY EACH CLASS MEMBER** by stating their name, mailing  
28 address, email address, and telephone number.

1 **INTERROGATORY NO. 2:**

2 **IDENTIFY ALL** persons and entities, their agents, successors in interest,  
3 assigns, heirs, executors, trustees, and administrators who are and/or were non-  
4 featured musicians and non-featured vocalists **BETWEEN** July 22, 2013 and the  
5 present.

6 **INTERROGATORY NO. 3:**

7 **IDENTIFY ALL** persons and entities, their agents, successors in interest,  
8 assigns, heirs, executors, trustees, and administrators who have received  
9 **ROYALTY** distributions from the **FUND** from July 22, 2013 to the present.

10 **INTERROGATORY NO. 4:**

11 On an annual basis, separately state the total **ROYALTIES** collected or  
12 received by the **FUND** since 2013.

13 **INTERROGATORY NO. 5:**

14 On an annual basis, separately state the total **ROYALTIES** paid to members  
15 of the **CLASS** from the **FUND** since 2013.

16 **INTERROGATORY NO. 6:**

17 On an annual basis, separately state the total **ROYALTIES** received by the  
18 **FUND** and not paid to members of the **CLASS** since 2013.

19 **INTERROGATORY NO. 7:**

20 On an annual basis, separately state the amounts paid from the **FUND** to  
21 SAG-AFTRA since 2013.

22 **INTERROGATORY NO. 8:**

23 On an annual basis, separately state the amounts paid from the **FUND** to  
24 AFM since 2013.

25 **INTERROGATORY NO. 9:**

26 If **YOU** contend that **ALL ROYALTIES** owed to the **CLASS** have been  
27 paid to the beneficiaries of the **FUND**, state **ALL** facts that support that contention.

1 **INTERROGATORY NO. 10:**

2       If **YOU** contend that the **SERVICE FEE** is a reasonable charge for the  
3 services provided by the **UNIONS**, state **ALL** facts that support that contention.

4 **INTERROGATORY NO. 11:**

5       Set forth the benefits conferred upon **UNION** members as a result of the  
6 **SERVICES AGREEMENT**.

7 **INTERROGATORY NO. 12:**

8       Set forth the benefits conferred upon non-**UNION** members as a result of the  
9 **SERVICES AGREEMENT**.

10 **INTERROGATORY NO. 13:**

11       If **YOU** contend that the **FUND** is entitled to use **ROYALTIES** to pay for the  
12 services set forth in the **SERVICES AGREEMENT**, state **ALL** facts that support  
13 that contention.

14 **INTERROGATORY NO. 14:**

15       If **YOU** contend that the **FUND** was entitled to enter into the **SERVICES**  
16 **AGREEMENT**, set forth all authority that supports that contention.

17 **INTERROGATORY NO. 15:**

18       **IDENTIFY ALL** individuals involved in the negotiation of the **TRUST**  
19 **AGREEMENT**.

20 **INTERROGATORY NO. 16:**

21       **IDENTIFY ALL** individuals responsible in the negotiation of the  
22 **SERVICES AGREEMENT**.

23 **INTERROGATORY NO. 17:**

24       Describe **ALL** actions by the **FUND** to avoid conflicts of interest  
25 **BETWEEN** the parties to the **SERVICES AGREEMENT**.

26 **INTERROGATORY NO. 18:**

27       Set forth **ALL** reasons why the **FUND** decided to cease mailing of the AFM  
28 & SAG-AFTRA Annual Report to the **FUND**'s beneficiaries in 2013.

1 **INTERROGATORY NO. 19:**

2 **IDENTIFY ALL** individuals who prepared the **FUND**'s Annual Reports  
3 from 2013 to the present.

4 **INTERROGATORY NO. 20:**

5 Set forth how much the **UNIONS** charge other performing rights  
6 organizations for the services set forth in the **SERVICES AGREEMENT**.

7 **INTERROGATORY NO. 21:**

8 State **ALL** facts supporting **YOUR** contention that the **CLASS** is not  
9 sufficiently numerous to treat this case as a class action.

10 **INTERROGATORY NO. 22:**

11 State **ALL** facts supporting **YOUR** contention that the **CLASS** is not  
12 ascertainable.

13 **INTERROGATORY NO. 23:**

14 State **ALL** facts supporting **YOUR** contention that common questions of law  
15 or fact do not predominate over any individual questions in this case.

16 **INTERROGATORY NO. 24:**

17 State **ALL** facts supporting **YOUR** contention that **PLAINTIFF**'s claims are  
18 not typical of the claims of the **CLASS**.

19 **INTERROGATORY NO. 25:**

20 State **ALL** facts supporting **YOUR** contention that **PLAINTIFF** will not  
21 adequately represent the **CLASS**.

22 **INTERROGATORY NO. 26:**

23 State **ALL** facts supporting **YOUR** contention that **PLAINTIFF**'s counsel  
24 will not adequately represent the **CLASS**.

25 **INTERROGATORY NO. 27:**

26 State **ALL** facts supporting **YOUR** contention that a class action is not the  
27 superior method of adjudicating this case.

28

1 **INTERROGATORY NO. 28:**

2 State **ALL** facts supporting **YOUR** contention that **CLASS MEMBERS**  
3 have or had knowledge of the **SERVICE FEE**.

4 **INTERROGATORY NO. 29:**

5 State **ALL** facts supporting **YOUR** contention that **CLASS MEMBERS**  
6 approved of the **SERVICE FEE**.

7 **INTERROGATORY NO. 30:**

8 **IDENTIFY ALL** individuals who decided to implement the **SERVICE**  
9 **FEE**.

10 DATED: February 22, 2019

KIESEL LAW LLP

12 By:   
13 PAUL R. KIESEL

14 MARIANA A. MCCONNELL

15 JOHNSON & JOHNSON LLP

16 NEVILLE L. JOHNSON  
17 JORDANNA G. THIGPEN  
18 DANIEL B. LIFSCHITZ

19 *Attorneys for Plaintiff and the Class*

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 At the time of service, I was over 18 years of age and **not a party to this**  
4 **action.** I am employed in the County of Los Angeles, State of California. My  
business address is 8648 Wilshire Boulevard, Beverly Hills, CA 90211-2910.

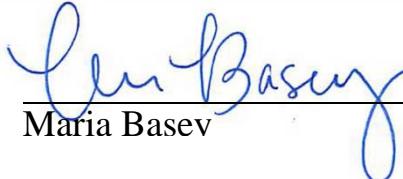
5 On February 22, 2019, I served true copies of the following document(s)  
6 described as **PLAINTIFF'S FIRST SET OF INTERROGATORIES TO**  
**DEFENDANTS** on the interested parties in this action as follows:

7 **SEE ATTACHED SERVICE LIST**

8 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package  
9 addressed to the persons at the addresses listed in the Service List and placed the  
envelope for collection and mailing, following our ordinary business practices. I am  
readily familiar with Kiesel Law LLP's practice for collecting and processing  
correspondence for mailing. On the same day that the correspondence is placed for  
collection and mailing, it is deposited in the ordinary course of business with the  
United States Postal Service, in a sealed envelope with postage fully prepaid.

12 I declare under penalty of perjury under the laws of the United States of  
13 America that the foregoing is true and correct and that I am employed in the office  
of a member of the bar of this Court at whose direction the service was made.

14 Executed on February 22, 2019, at Beverly Hills, California.

15   
16 \_\_\_\_\_  
17 Maria Basev

1 **SERVICE LIST**

2 *Kevin Risto, et. al. v. Screen Actors Guild-American Federation Of Television  
And Radio Artists, et. al.; Case No. 2:18-cv-07241-CAS-PLA*

3

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# **EXHIBIT 5**

4 KEVIN RISTO, on behalf of  
himself and all others  
5 similarly situated,

6 Plaintiffs,

7 vs. No.

2:18-cv-07241-CAS-PLA

8

SCREEN ACTORS GUILD-AMERICAN  
9 FEDERATION OF TELEVISION AND  
RADIO ARTISTS, a Delaware  
10 corporation; AMERICAN  
FEDERATION OF MUSICIANS OF THE  
11 UNITED STATES AND CANADA, a  
California nonprofit  
12 corporation, et al.,

13 Defendants.

14 \_\_\_\_\_ /

15 Wednesday, Decem

23 — — —

24 GOLKOW TECHNOLOGIES, INC.  
877.370.3377 ph | 971.591.5672 fax

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21 dlifschitz@jpllplaw.com

22

23

24

25 //

1 REMOTE APPEARANCES (continued)

2

3

4 For the Defendants:

5 JENNER & BLOCK

6 By: ANDREW J. THOMAS, ESQ.

7 ANDREW G. SULLIVAN, ESQ.

8 ANNA LYONS, ESQ.

9 633 W. 5th Street, Suite 3600

10 Los Angeles, California 90071

11 (213) 239-5155

12 ajthomas@jenner.com

13 agsullivan@jenner.com

14 alyons@jenner.com

15

16 ALSO PRESENT: ALEX KLYUSNER, videographer

17

18 --oo--

19

20

21

22

23

24

25

1 - - -

2 THE VIDEOGRAPHER: We are now on the  
3 record. My name is Alex Klyusner, I'm a  
4 videographer for Golkow Litigation Services.  
5 Today's date is December 9th, 2020 and the time is  
6 9:07 a.m.

7                   This remote video deposition is being held  
8                   in the matter of Kevin Risto versus Screen Actors  
9                   Guild, et al. for the U.S. District Court, Central  
10                  District of California. The deponent is Julie  
11                  Sandell.

12 All parties to this deposition are  
13 appearing remotely and have agreed to the witness  
14 being sworn in remotely. Due to the nature of  
15 remote reporting, please pause briefly before  
16 speaking to ensure all parties are heard completely.

17 Will counsel please identify themselves.

18 MS. McCONNELL: Mariana McConnell from  
19 Kiesel Law for plaintiff and the class.

20 MR. BRANCOLINI: Nico Brancolini from  
21 Kiesel Law on behalf of plaintiff and the class

22 MR. LIFSHITZ: Daniel Lifschitz on behalf  
23 of plaintiff and the class from Johnson & Johnson

24 MR. THOMAS: Andrew Thomas from Jenner &  
25 Block on behalf of the defendants and the witness

1 MR. SULLIVAN: Andrew Sullivan from Jenner  
2 & Block on behalf of all defendants and the witness.

3 THE VIDEOGRAPHER: Okay. The court  
4 reporter is Gina Carbone and will now please swear  
5 in the witness.

6 THE REPORTER: I'm sorry. Ms. Lyons was, I  
7 think, introducing herself but we couldn't hear her.

8 And Mr. Sullivan, you're on mute as well.

9 MR. SULLIVAN: Apologies.

10 If Anna is having difficulty joining, I'll  
11 identify her and say that Anna Lyons from Jenner &  
12 Block on behalf of all defendants and the witness is  
13 also present.

14 **JULIE SANDELL,**

15 **called as a witness, having been duly sworn,**

16 **testified as follows:**

17 **EXAMINATION BY MS. McCONNELL**

18 **BY MS. McCONNELL:**

19 **Q. Good morning, Ms. Sandell.**

20 **A. Good morning.**

21 **Q. Could you please state and spell your full**  
22 **name for the record.**

23 **A. Julie Sandell, J-U-L-I-E, S-A-N-D-E-L-L.**

24 Q. Okay. Thank you. So before we get started  
25 with the substance of questions, I want to go over

1 Q. Okay. That's fine.

2 You haven't been involved in any of the,  
3 I'll call them, like, budgetary decisions on  
4 updating the AS400 or anything like that?

5 A. No.

6 Q. Was that a no? Sorry.

7 A. No.

8 Q. You told us about collecting the emails and  
9 putting them in folders. Did you at any time count  
10 how many email requests you found from the Fund  
11 researchers to the union?

12 A. No. It was --

13 Q. And -- sorry?

14 A. It was thousands.

15 (Reporter clarification.)

16 BY MS. McCONNELL:

17 Q. Did you notice whether there were more  
18 requests to local AFM chapters or local SAG-AFTRA  
19 chapters?

20 A. No.

21 Q. Okay. I think that was all just  
22 background, so now I'll get into my deposition  
23 questions.

24 Just by way of figuring out your background

25 and expertise, did you attend college?

1 A. Yes.

2 Q. Where did you go?

3 A. Cal State Northridge.

4 Q. And did you obtain a degree?

5 A. Yes.

6 Q. And what was that degree in?

7 A. Radio, TV and film.

8 Q. Did you go to graduate school?

9 A. No.

10 Q. What was your most recent position prior to  
11 working for the Fund?

12 A. I worked for Bonnie Raitt.

13 Q. What year did you start -- what did you do  
14 for Bonnie Raitt?

15 A. I managed her properties.

16 Q. When did you start working at the Fund?

17 A. September of 2009.

18 Q. What was your first position at the Fund?

19 A. Research associate.

20 Q. And generally what were the duties of your  
21 position as a research associate?

22 A. To research the titles, to find the  
23 nonfeatured performers, and to answer phones and  
24 work with the participants. And I was the primary  
25 person that did the unclaimed and did the outreach

1 MS. McCONNELL: Yeah. I didn't like how I  
2 asked it the first time anyway, so....

3 Q. At any point in time up until today, were  
4 you asked to collect any data showing the number of  
5 times a nonfeatured performer was identified due to  
6 a union effort as opposed to Fund effort?

7 MR. THOMAS: Same objections.

8 THE WITNESS: That's kind of a confusing  
9 question to me.

10 BY MS. McCONNELL:

11 Q. You told us about the different sources  
12 that the Fund can look at to identify nonfeatured  
13 performers on tracks, and I'm wondering has anyone  
14 ever asked you to segregate whether the Fund has  
15 identified a performer due to something that the  
16 union has provided the Fund, as opposed to an online  
17 resource like Discogs or AllMusic?

18 A. Well, that would be too time consuming. It  
19 wouldn't be worth it.

20 Q. Why wouldn't it be worth it?

21 A. Because our objective is to research the  
22 title correctly to the best of our ability and get  
23 it as right as right can be with all of our sources.  
24 We don't really think about it that way.

25 Q. All right. You don't -- you don't have --

# **EXHIBIT 6**



Fulcrum Financial Inquiry LLP  
707 Wilshire Boulevard, Suite 2050  
Los Angeles, CA 90017  
(213) 787-4100  
www.fulcrum.com

February 17, 2020

Andrew J. Thomas, Esq.  
Andrew Sullivan, Esq.  
Jenner & Block LLP  
633 West 5th Street, Suite 3600  
Los Angeles, CA 90071-2054

Gentlemen:

Enclosed is Fulcrum's third billing in connection with Kevin Risto, (as class representative) vs. Screen Actors Guild - American Federation Of Television And Radio Artists, American Federation of Musicians of the United States and Canada, AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund, et al. (USDC, Central District of California Case No. 2:18-cv-07241-CAS). This billing covers services for one and a half month period from January 1, 2021 through February 15, 2021. If you or others require additional information, I will be happy to provide it.

In accordance with our engagement letter, this bill is due immediately and is delinquent if not paid by March 17, 2021. However, in accordance with the engagement letter, I would appreciate the Fund's review and approval (email is OK) of the attached bill before issuance of my expert report, which is currently scheduled for completion on March 8, 2021. Please contact me if this approval and/or payment commitment cannot be met.

I would appreciate payment through electronic means. If you prefer to send a physical check, it would be best to send this to my home office (see my August 25 email for the address), as physical mail sent to Fulcrum's downtown office is being forwarded by the USPS, and we are finding this to be both slow and not reliable. Fulcrum's electronic payment information follows:

Bank: Farmers & Merchant Bank  
315 N. Harbor Boulevard, Fullerton, CA 92832  
714-578-1945  
Bank ABA # 122201198  
Account Name: Fulcrum Financial Inquiry LLP  
Account # [REDACTED]  
SWIFT # [REDACTED]

It is a pleasure to assist you on this matter. Please let me know if we can be of further assistance. My direct telephone number is 213-787-4111.

Very truly yours,  
Fulcrum Financial Inquiry LLP

By:   
David Nolte

*"Give me a lever long enough and a fulcrum on which to place it and I shall move the world"*  
Archimedes



Fulcrum Financial Inquiry LLP  
707 Wilshire Boulevard, Suite 2050  
Los Angeles, CA 90017  
(213) 787-4100  
www.fulcrum.com

February 17, 2020

Andrew J. Thomas, Esq.  
Andrew Sullivan, Esq.  
Jenner & Block LLP  
633 West 5th Street, Suite 3600  
Los Angeles, CA 90071-2054

INVOICE

For professional services rendered in connection with *Kevin Risto, (as class representative) vs. Screen Actors Guild - American Federation Of Television And Radio Artists, American Federation of Musicians of the United States and Canada, AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund, et al. (USDC, Central District of California Case No. 2:18-cv-07241-CAS)* incurred from **January 1, 2021 through February 15, 2021**. The bill was calculated as follows:

**\$18,375**

Personnel	Hours	Rate	Total
David Nolte	29.4	625	\$18,375
All out-of-pocket costs have been absorbed (not billed)			
<b>Total</b>			<b>\$ 18,375</b>

The above time was incurred on the following tasks:

1. Read and considered the January 20, 2021 deposition of Stefanie Taub, and the exhibits thereto
2. Read and addressed the notes prepared by Ms. Taub in connection with her January 20, 2021 deposition
3. **Reviewed and addressed the 50-title sample of information performed by the Fund's research personnel**
4. Read and address Plaintiff's written discovery responses, dated February 12, 2021
5. Telephone consultations on January 11, January 14, and January 26, and February 1, 2021
6. Updated Fulcrum's draft report, and provided the same to legal counsel on February 10

If you have any questions regarding this invoice, please contact David Nolte at 213-787-4111.

**Due and payable immediately. Delinquent if not paid by March 17, 2021. However, in accordance with the engagement letter, please review and approve this bill before Fulcrum's current report is finalized (scheduled for March 8, 2021).**

Fulcrum's Taxpayer Identification Number is [REDACTED]



Fulcrum Financial Inquiry LLP  
707 Wilshire Boulevard, Suite 2050  
Los Angeles, CA 90017  
(213) 787-4100  
www.fulcrum.com

March 17, 2020

Andrew J. Thomas, Esq.  
Andrew Sullivan, Esq.  
Jenner & Block LLP  
633 West 5th Street, Suite 3600  
Los Angeles, CA 90071-2054

Gentlemen:

Enclosed is Fulcrum's fourth billing in connection with Kevin Risto, (as class representative) vs. Screen Actors Guild - American Federation of Television and Radio Artists, American Federation of Musicians of the United States and Canada, AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund, et al. (USDC, Central District of California Case No. 2:18-cv-07241-CAS). This billing covers services for the period from February 16 through March 15, 2021. If you or others require additional information, I will be happy to provide it.

In accordance with our engagement letter, this bill is due immediately and is delinquent if not paid by April 16, 2021. Please contact me if this approval and/or payment commitment cannot be met.

Consistent with what occurred with Fulcrum's earlier invoices, I would appreciate payment through electronic means. If you prefer to send a physical check, it would be best to send this to my home office (see my August 25 email for the address), as physical mail sent to Fulcrum's downtown office is being forwarded by the USPS, and we are finding this to be both slow and not reliable. Fulcrum's electronic payment information follows:

Bank: Farmers & Merchant Bank  
315 N. Harbor Boulevard, Fullerton, CA 92832  
714-578-1945  
Bank ABA # 122201198  
Account Name: Fulcrum Financial Inquiry LLP  
Account # [REDACTED]  
SWIFT # [REDACTED]

It is a pleasure to assist you on this matter. Please let me know if we can be of further assistance. My direct telephone number is 213-787-4111.

Very truly yours,  
Fulcrum Financial Inquiry LLP

By:   
David Nolte

*"Give me a lever long enough and a fulcrum on which to place it and I shall move the world"*  
Archimedes



Fulcrum Financial Inquiry LLP  
707 Wilshire Boulevard, Suite 2050  
Los Angeles, CA 90017  
(213) 787-4100  
www.fulcrum.com

March 17, 2020

Andrew J. Thomas, Esq.  
Andrew Sullivan, Esq.  
Jenner & Block LLP  
633 West 5th Street, Suite 3600  
Los Angeles, CA 90071-2054

### INVOICE

For professional services rendered in connection with *Kevin Risto, (as class representative) vs. Screen Actors Guild - American Federation of Television and Radio Artists, American Federation of Musicians of the United States and Canada, AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund, et al. (USDC, Central District of California Case No. 2:18-cv-07241-CAS)* incurred from **February 16 through February 15, 2021**. The bill was calculated as follows:

**\$29,750**

Personnel	Hours	Rate	Total
David Nolte	32.2	625	\$20,125
Brian Nolte	25.0	385	9,625
All out-of-pocket costs have been absorbed (not billed)			
<b>Total</b>			<b>\$29,750</b>

The above time was incurred on the following tasks:

1. Performed analysis to provide the following tallies of data associated with unique songs (i.e., there is no duplication where data was provided across multiple years):
  - a. Count of performances documented with and without Union session repots
  - b. Count of participants in songs documented with and without Union session repots
  - c. Total contributions from songs documented with and without Union session repots;
2. **Performed analysis on the 50-song sample provided by client to calculate the number of participants and the gross dollar amounts incorrectly distributed without the benefit of Union data;**
3. **The Fund provided a new version of the 50-song sample; rechecked Fulcrum's analysis to ensure there were no changes to the underlying data that would alter the earlier conclusion;**
4. Read/scanned the following depositions:
  - a. Crabtree-Ireland (two days)
  - b. Hair (two days)
  - c. Dreith;
5. Reviewed the amended interrogatory responses submitted by the Fund and the Unions;

6. Initial research regarding the cost percentages of other music royalty reporting organizations;
7. Telephone consultations with legal counsel and Fund personnel on March 3, 2021 and March 4, 2021;
8. Created exhibits that support Fulcrum's conclusions, for inclusion in Fulcrum's report;
9. Updated Fulcrum's draft report for all of the previously-described steps;
10. Updated report to include production numbers on documents produced;
11. Various additional communications with counsel;
12. Reviewed comments received on Fulcrum's report, and finalized Fulcrum's March 8, 2021 report and associated exhibits;

If you have any questions regarding this invoice, please contact David Nolte at 213-787-4111.

**Due and payable immediately. Delinquent if not paid by April 16, 2021.**

Fulcrum's Taxpayer Identification Number is [REDACTED]

# **EXHIBIT 7**

**From:** Mariana A. McConnell <Mcconnell@kiesel.law>

**Sent:** Monday, June 14, 2021 10:53 AM

**To:** A.J. Thomas <ajthomas@jenner.com>; Andrew Sullivan <agsullivan@jenner.com>; Anna Lyons <alyons@jenner.com>

**Cc:** Paul R. Kiesel <kiesel@kiesel.law>; Nicholas Brancolini <Brancolini@kiesel.law>; Daniel Lifschitz <dlifschitz@jillplaw.com>; Neville Johnson <njohnson@jillplaw.com>

**Subject:** Risto - Sandell Deposition

Hello,

We would like to get the Sandell deposition scheduled on either Wednesday or Thursday of this week since our MILs are due on Monday. Please let us know asap.

Thanks.

Mariana

# **EXHIBIT 8**

**From:** Sullivan, Andrew G. <AGSullivan@jenner.com>  
**Sent:** Wednesday, June 16, 2021 7:40 AM  
**To:** Mariana A. McConnell <Mcconnell@kiesel.law>  
**Cc:** Thomas, Andrew J. <AJThomas@jenner.com>; Lyons, Anna K. <ALyons@jenner.com>; Paul R. Kiesel <kiesel@kiesel.law>; Nicholas Brancolini <Brancolini@kiesel.law>; Daniel Lifschitz <DLifschitz@jjllplaw.com>; Neville Johnson <njohnson@jjllplaw.com>  
**Subject:** Re: Risto - Sandell Deposition

Mariana,

In our view, the Court has rejected Plaintiff's position that the Sandell declaration and related testimony should be excluded, and has determined that any prejudice Plaintiff has suffered as a result of the timing can be remedied by a short deposition. As explained in prior briefing, the final results of the 50 title exercise could not have been disclosed during the discovery period because they did not exist then. Defendants' prior briefing also corrected Plaintiff's inaccurate assertion—repeated in your email below—that Ms. Sandell is opining on “conclusions” drawn from the 50 title exercise.

Defendants can make Ms. Sandell available for deposition from 1-3pm on either June 25 or June 28. Defendants will work to identify another mutually agreeable time for Ms. Sandell's deposition if this timing does not work for Plaintiff.

Regards,

Andrew

On Jun 15, 2021, at 8:42 AM, Mariana A. McConnell <[Mcconnell@kiesel.law](mailto:Mcconnell@kiesel.law)> wrote:

External Email – Exercise Caution

Andrew,

Defendants' failure to disclose the study during discovery is just one reason why it should be excluded. The study is also inherently flawed and not relevant, the study is highly prejudicial, misleading, and a waste of time, and Ms. Sandell is not qualified to architect or perform a study or report on its conclusions, among other deficiencies. So, no, we do not agree that taking her deposition moots any motion in limine.

We have three options:

1. You present Ms. Sandell on Wednesday or Thursday and we file a Motion in Limine on Monday
2. You present Ms. Sandell on a later date and agree to an alternate briefing schedule on this Motion
3. You do not present Ms. Sandell this week and do not agree on an alternate briefing schedule, and we will file a Motion on Monday explaining your failures to the Court and providing another reason to exclude the study.

Let us know as soon as possible which option you decide.

Mariana

---

**From:** Andrew Sullivan <[AGSullivan@jenner.com](mailto:AGSullivan@jenner.com)>

**Date:** Tuesday, June 15, 2021 at 8:25 AM

**To:** "Mariana A. McConnell" <[Mcconnell@kiesel.law](mailto:Mcconnell@kiesel.law)>

**Cc:** "A.J. Thomas" <[AJThomas@jenner.com](mailto:AJThomas@jenner.com)>, Anna Lyons <[ALyons@jenner.com](mailto:ALyons@jenner.com)>, "Paul R. Kiesel" <[kiesel@kiesel.law](mailto:kiesel@kiesel.law)>, Nicholas Brancolini <[Brancolini@kiesel.law](mailto:Brancolini@kiesel.law)>, Daniel Lifschitz <[DLifschitz@jillplaw.com](mailto:DLifschitz@jillplaw.com)>, Neville Johnson <[njohnson@jillplaw.com](mailto:njohnson@jillplaw.com)>

**Subject:** Re: Risto - Sandell Deposition

Mariana,

Consistent with Judge Snyder's order on the motion for summary judgment, we will make Ms. Sandell available for a two-hour deposition. In our view, this opportunity to depose Ms. Sandell eliminates any possible prejudice to Plaintiff and thus moots any motion in limine Plaintiff might file to exclude Ms. Sandell from testifying about the 50 title exercise and related documentation. We will reach out to Ms. Sandell regarding her availability for a deposition, but we cannot guarantee that she will be available this week.

Thanks,  
Andrew

On Jun 14, 2021, at 10:53 AM, Mariana A. McConnell <[Mcconnell@kiesel.law](mailto:Mcconnell@kiesel.law)> wrote:

External Email – Exercise Caution

Hello,

We would like to get the Sandell deposition scheduled on either Wednesday or Thursday of this week since our MILs are due on Monday. Please let us know asap.

Thanks.  
Mariana

---

## Andrew G. Sullivan

**Jenner & Block LLP**  
633 West 5th Street  
Suite 3600, Los Angeles, CA 90071 | [jenner.com](http://jenner.com)  
+1 213 239 2263 | TEL  
+1 213 618 6890 | MOBILE  
[AGSullivan@jenner.com](mailto:AGSullivan@jenner.com)  
[Download V-Card](#)

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# EXHIBIT 9

## **AGREEMENT AND DECLARATION OF TRUST**

**AFM and SAG-AFTRA  
Intellectual Property Rights Distribution Fund**

**Established  
September 16, 1998**

**Amended and Restated  
July 26, 2012**

THIS AGREEMENT AND DECLARATION OF TRUST is made and entered into as of the 16<sup>th</sup> day of September, 1998, and is amended and restated as of July 26, 2012, in the City of New York, State of New York, by and between the American Federation of Musicians of the United States and Canada, AFL-CIO-CLC ("AFM") and the Screen Actors Guild - American Federation of Television and Radio Artists ("SAG-AFTRA"), hereinafter jointly known as the Unions.

### **Preamble**

WHEREAS, this Agreement and Declaration of Trust was originally established as of the 16<sup>th</sup> day of September, 1998, in the City of New York, State of New York, by and between the AFM and the American Federation of Television and Radio Artists ("AFTRA"); and

WHEREAS AFTRA merged with the Screen Actors Guild ("SAG") effective March 2012, and the merged unions are now constituted as SAG-AFTRA; and

WHEREAS, the Trustees now desire to amend and restate the Agreement and Declaration of Trust to reflect the merger of AFTRA into the merged union SAG-AFTRA, as well as to incorporate other amendments that the Trustees have made from time to time; and

WHEREAS, the Unions or their designated entities obtain and distribute to artists royalties and remuneration that are created by U.S. or foreign law and that are appropriate for collective administration; and

WHEREAS, the Unions have entered into a Reciprocal Agreement and an Annex for the Distribution of Record Rental Royalties Collected in Japan, pursuant to which they will receive and distribute record rental remuneration payable to non-featured instrumentalists and vocalists under the law of Japan; and

WHEREAS, the Unions have entered into other such agreements for the receipt and distribution of royalties or remuneration for the benefit of their members and other performing artists in the United States and Canada, and will continue to enter into such agreements; and

WHEREAS, to accomplish this purpose the Unions established a trust fund known as the AFM and AFTRA Intellectual Property Rights Distribution Fund for receiving and

distributing royalties and remuneration; and

WHEREAS, the trust fund formerly known as the AFM and AFTRA Intellectual Property Rights Distribution Fund shall now be known as the AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund; and

WHEREAS, the Unions desire to restate the terms and conditions under which the said Fund is to be established and administered;

NOW, THEREFORE, in consideration of the premises, it is mutually understood and agreed as follows:

**Article I**  
**Definitions**

*Section 1. UNIONS.* The term "Unions" as used herein shall mean the American Federation of the Musicians of the United States and Canada, AFL-CIO-CLC, and the Screen Actors' Guild – American Federation of Television and Radio Artists.

*Section 2. AFM.* The term "AFM" as used herein shall mean the American Federation of Musicians of the United States and Canada, AFL-CIO-CLC.

*Section 3. SAG-AFTRA.* The term "SAG-AFTRA" as used herein shall mean the Screen Actors Guild – American Federation of Television and Radio Artists, or, prior to March 2012, the American Federation of Television and Radio Artists.

*Section 4. AGREEMENT AND DECLARATION OF TRUST.* The term "Agreement and Declaration of Trust" as used herein shall mean this instrument including any amendments hereto and modifications hereof.

*Section 5. FUND.* The term "Fund" as used herein shall mean the AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund.

*Section 6. AGREEMENT FOR THE RECEIPT AND DISTRIBUTION OF REMUNERATION.* The term "agreement for the receipt and distribution of remuneration" as used herein shall mean any agreement entered into by the AFM, SAG-AFTRA or the Unions with a collecting society, rights organization or other appropriate entity to receive royalties or remuneration held by that entity and to distribute such royalties and remuneration to eligible artists.

*Section 7. ARTISTS.* The term "artists" as used herein shall mean instrumental musicians and vocalists.

**Article II**  
**Creation of Fund**

*Section 1. ESTABLISHMENT OF FUND.* The AFM and AFTRA Intellectual Property Rights Distribution Fund, which was established on September 16, 1998, is hereby amended and restated as the AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund, to be used for the

purpose set forth in this Agreement and Declaration of Trust.

*Section 2. GENERAL PURPOSE.* The Fund shall be a trust fund and shall be used for the purpose of receiving and distributing royalties or remuneration to artists in accordance with such agreements for receipt and distribution of remuneration as are entered into by the Unions with the relevant collecting societies, rights organizations or other appropriate entities. The Fund shall further provide the means for financing the expenses of the Trustees and the operation and administration of the Fund, in accordance with this Agreement and Declaration of Trust. The Fund is intended to satisfy the requirements of section 501(c)(6) of the Internal Revenue Code and shall be construed in all respects consistently with section 501(c)(6).

### **Article III Trustees**

*Section 1. AFM AND SAG-AFTRA TRUSTEES.* The operation and administration of the Fund shall be the joint responsibility of six Trustees, three appointed by the AFM, of which no fewer than one shall be a rank-and-file representative, and three appointed by SAG-AFTRA, of which no fewer than one shall be a rank-and-file representative.

*Section 2. TERM OF TRUSTEES.* Each Trustee shall continue to serve as such until his or her death, incapacity, resignation, or removal by the appointing Union. Each Union may remove or replace its Trustee at will.

*Section 3. SUCCESSOR TRUSTEES.* Each Union shall appoint its successor Trustees.

*Section 4. FORM OF NOTIFICATION.* In case any Trustee shall be removed, replaced, or succeeded, a statement in writing by the relevant Union shall be sufficient evidence of its action, when forwarded to the Fund and to the remaining Trustees. Any resignation shall be evidenced in writing and forwarded by registered mail to the Fund and the remaining Trustees, and shall not be effective for two months following the date of mailing unless a successor Trustee has been appointed.

### **Article IV Powers, Duties and Obligations of Trustees**

*Section 1. PROPERTY AND ASSISTANCE.* The Trustees are authorized and empowered to lease or purchase such premises, materials, supplies and equipment, and to hire, employ and retain such legal counsel, investment advisor, administrative, accounting, actuarial, clerical and other assistants or employees as in their discretion they may find necessary or appropriate in the performance of their duties.

*Section 2. CONSTRUCTION OF AGREEMENT.* The Trustees shall have power to construe the provisions of this Agreement and Declaration of Trust and the terms used herein, and any construction adopted by the Trustees in good faith shall be binding upon the AFM, SAG-AFTRA, and artists claiming benefits under the Fund.

*Section 3. GENERAL POWERS.* The Trustees are hereby empowered, in addition to other such powers as are set forth herein or conferred by law:

- A. To establish and administer the Fund on behalf of artists who may be entitled to payments pursuant to agreements for the receipt and distribution of remuneration entered into by the AFM, SAG-AFTRA or the Unions and determined by the Trustees to be appropriate for administration by the Fund.
- B. As to each agreement for the receipt and distribution of remuneration recommended by the AFM, SAG-AFTRA or the Unions, to decide whether or not to administer the agreement through the Fund.
- C. As to each agreement for the receipt and distribution of remuneration which is to be administered through the Fund, to establish governing rules and procedures for the distribution that are consistent with the relevant agreement.
- D. As to each agreement for the receipt and distribution of remuneration which is to be administered through the Fund, to pay all expenses necessary to the establishment, administration and operation of the agreement out of the receipts generated by the agreement.
- E. To enter into any and all contracts and agreements for carrying out the terms of this Agreement and Declaration of Trust and for the administration of the Fund and do all acts as they, in their discretion, may deem necessary and advisable.
- F. To compromise, settle, arbitrate, and release claims or demands in favor of or against the Fund or the Trustees on such terms and conditions as the Trustees may deem advisable.
- G. To establish and accumulate as part of the Fund a reserve or reserves, adequate, in the opinion of the Trustees, to carry out the purposes of the Fund.
- H. To pay out of the Fund all real and personal property taxes, income taxes and other taxes of any and all kinds levied or assessed under existing or future laws upon or in respect to the Fund or any money, property, or securities forming a part thereof.
- I. To make appropriate allocations of common administrative expenses and disbursements shared or to be shared with any other Plan or Fund, or among the various agreements for the receipt and distribution of remuneration.
- J. To receive contributions, payments, distributions or transfers from any source whatsoever to the extent permitted by law.
- K. To establish advisory committees composed of AFM and SAG-AFTRA representatives and/or other artists or artists' representatives, and to set forth the duties and functions of the members of such advisory committees.
- L. To do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder.

- M. To establish such bank account or accounts as the Trustees deem necessary in their discretion, including escrow accounts pending the adoption of distribution rules governing the administration of an agreement for the receipt and distribution of remuneration.
- N. To do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary to accomplish the general objective of distributing remuneration to eligible artists in the most efficient and economical manner.
- O. To purchase or obtain from the AFM, SAG-AFTRA, the AFM and Employers' Pension Fund, the AFTRA Health and Retirement Funds, the Phonograph Manufacturers' Special Payments Fund, the Motion Picture Special Payments Fund or any commercial source any data helpful for the identification and location of artists eligible for remuneration or the identification of recorded or other performances covered by an agreement for the receipt and distribution of remuneration.
- P. To invest the assets of the Fund with care, skill, prudence and diligence under circumstances then prevailing that a prudent person, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with such aims, without regard to state law restrictions on investments.

*Section 4. COMPENSATION.* The Trustees shall not receive compensation for the performance of their duties.

*Section 5. PERSONAL LIABILITY.* Neither the Trustees nor any individual or successor Trustee shall be personally answerable or personally liable for any liabilities or debts of the Fund contracted by them as Trustees, or for the non-fulfillment of contracts, but the same shall be paid out of the Fund and the Fund is hereby charged with a first lien in favor of such Trustee for indemnification for any amounts paid out by any such Trustee for any such liability and for indemnification against any liability of any kind which the Trustees or any of them may incur hereunder; provided, however, that nothing herein shall exempt any Trustee from liability arising out of his own willful misconduct, bad faith or gross negligence, or entitle such Trustee to indemnification for any amounts paid or incurred as a result thereof.

The Trustees and each individual Trustee shall not be liable for any error of judgment or for any loss arising out of any act or omission in the execution of their duties so long as they act in good faith and without gross negligence; nor shall any Trustee, in the absence of his own willful misconduct, bad faith or gross negligence, be personally liable for the acts or omissions (whether performed at the request of the Trustees or not) of any other Trustee, or of any agent or attorney elected or appointed by or acting for the Trustees.

The Trustees shall be fully protected in acting upon any instrument, certificate, or paper believed by them to be genuine and to be signed or presented by the proper person or persons, and shall be under no duty to make any investigation or inquiry as to any statement contained in any such writing, but may accept the same as conclusive evidence of the truth and accuracy of the statements contained therein.

Neither the AFM nor SAG-AFTRA shall in any way be liable in any respect for any of the acts, omissions or obligations of the Trustees, individually or collectively,

The Trustees may from time to time consult with legal counsel and shall be fully protected in acting upon such advice of counsel to the Fund as respects legal questions.

*Section 6. BOOKS OF ACCOUNT.* The Trustees shall keep true and accurate books of account and records of all their transactions, which shall be audited at least annually by a certified public accountant selected by the Trustees. Such audits shall be available at all times for inspection by the AFM and SAG-AFTRA.

*Section 7. EXECUTION OF DOCUMENTS.* The Trustees may authorize and designate an employee or agent of the Fund to execute any notice or other instrument in writing.

*Section 8. DEPOSIT AND WITHDRAWAL OF FUNDS.* All moneys received by the Trustees hereunder shall be deposited by them in such bank or banks as the Trustees may designate for that purpose, and all withdrawals of moneys from such account or accounts shall be made only by checks signed by the Trustees, except that the Trustees may, in their discretion, designate and authorize an employee or agent of the Fund to sign checks upon such separate and specific bank account or bank accounts as the Trustees may designate and establish for such purpose.

*Section 9. SURETY BONDS.* The Trustees and any employees of the Trustees who are empowered and authorized to sign checks as aforesaid shall each be bonded by a duly authorized surety company in such amounts as may be determined from time to time by the Trustees. Each such employee employed by the Trustees who may be engaged in handling moneys of the Trust Fund shall also be bonded by a duly authorized surety company in the same manner. The cost of the premium on such bonds shall be paid out of the Fund.

## **Article V** **Selection of Remuneration Systems to Be Administered by the Fund**

*Section 1. ACCEPTANCE FOR ADMINISTRATION THROUGH THE FUND.* As to each agreement for the receipt and distribution of remuneration entered into by the AFM, SAG-AFTRA, or the Unions jointly, and referred by one of them to the Trustees for their consideration, the Trustees, in their sole discretion, may decide whether or not the agreement is appropriate for administration through the Fund. An agreement will be accepted for administration through the Fund only if the Trustees, voting in accordance with Article VII, Section 3, agree to accept it. The refusal of the AFM or SAG-AFTRA to accept an agreement for administration by the Fund shall not be subject to arbitration. The acceptance of an agreement for administration by the Fund shall be in writing.

*Section 2. HOLDING MONEY PENDING ACCEPTANCE FOR ADMINISTRATION.* The Fund may hold moneys received pursuant to an agreement for the receipt and distribution of remuneration in an escrow account pending the Trustees' decision whether to accept the agreement for administration through the Fund. If the Trustees refuse acceptance, the moneys will be returned with any interest accumulated thereon and minus any administrative costs incurred to the AFM, SAG-AFTRA or the Unions jointly in accordance with the agreement for the receipt and distribution of remuneration.

*Section 3. CONTINUATION OF ADMINISTRATION.* Once an agreement for the receipt and distribution of remuneration has been accepted for administration through the Fund, it shall continue to be administered through the Fund until such time as the Trustees, voting in accordance with Article VII, Section 3, agree that such administration is no longer appropriate. If the Trustees, voting in accordance with Article VII, Section 3, disagree over whether continued administration is appropriate, they will attempt to resolve their difference on the matter. If they cannot resolve their difference on the matter, they agree to submit the dispute to mediation administered by the American Arbitration Association. If mediation fails to resolve the dispute, the agreement for the receipt and distribution of remuneration shall be discontinued for administration through the Fund upon the vote of the Trustees for one Union, voting in accordance with Article VII, Section 3.

## **Article VI** **Plan of Payments and Distributions**

*Section 1. PAYMENTS.* The Trustees shall have full authority to determine all questions of the nature and amount of payments to be provided to artists consistent with the relevant agreements for the receipt and distribution of remuneration.

*Section 2. ELIGIBILITY FOR PAYMENTS.* The Trustees shall have full authority to determine eligibility requirements for payments, consistent with the relevant agreements for the receipt and distribution of remuneration, and to adopt rules and regulations setting forth the same, which shall be binding on the artists.

*Section 3. METHOD OF PROVIDING PAYMENTS.* The payments shall be provided and maintained by such means as the Trustees in their sole discretion shall determine.

*Section 4. WRITTEN PLAN OF PAYMENTS AND DISTRIBUTIONS.* The detailed basis upon which payments are to be made pursuant to each agreement for the receipt and distribution of remuneration shall be specified in writing by appropriate action of the Trustees subject, however, to such changes or modifications by the Trustees from time to time as they in their discretion may determine. All such changes or modifications shall similarly be specified in writing by appropriate resolution of the Trustees.

*Section 5. DETERMINING CLAIMS FOR PAYMENTS.* The Trustees shall have full authority to determine all claims for payments, provided that they may delegate to the duly designated administrators of the Fund authority to determine such claims initially. The administrators' initial determination shall be submitted to the Trustees for final determination. An individual who believes that he or she has been adversely affected by the administrators' or Trustees' determinations regarding payment of benefits may submit a written appeal to the Trustees. The decision of the Trustees shall be final.

## **Article VII** **Meetings and Decision of Trustees**

*Section 1. MEETING OF TRUSTEES.* Meetings of the Trustees shall be held at such place or places as may be agreed upon by the Trustees.

*Section 2. ACTION BY TRUSTEES WITHOUT MEETING.* The Trustees may also take action in writing without a meeting.

*Section 3. AGREEMENT OF THE TRUSTEES.* All actions of the Trustees shall be by agreement, with the AFM Trustees casting one vote, and the SAG-AFTRA Trustees casting one vote. In the event that any matter presented for decision cannot be decided because of a failure of agreement, the matter may be submitted for arbitration in accordance with Article VIII.

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*Section 4. MINUTES OF MEETINGS.* The Trustees shall keep minutes of all meetings but such minutes need not be verbatim.

**Article VIII**  
**Arbitration**

*Section I. APPLICATION OF THIS ARTICLE.* A Trustee may apply to the American Arbitration Association in the area where the Fund maintains its principal office for the designation of an arbitrator who will decide any disputes between the Trustees or any other matter submitted to arbitration in accordance with the provisions of Article VII, Section 3. The decision of the arbitrator shall be final and binding. Decisions to accept an agreement for the receipt and distribution of remuneration for administration through the Fund, pursuant to Article V, Section 1, shall not be subject to arbitration.

*Section 2. EXPENSES OF ARBITRATION.* The cost and expense incidental to any arbitration proceeding, including the fee, if any, of the impartial arbitrator, shall be a proper charge against the Fund and the Trustees are authorized and directed to pay such charges.

**Article IX**  
**Execution of Trust Agreement**

*Section 1. COUNTERPARTS.* This Trust Agreement may be execute in counterparts.

**Article X**  
**Amendment to Trust Agreement**

*Section 1. AMENDMENT BY TRUSTEES.* This Agreement and Declaration of Trust may be amended in any respect from time to time by the Trustees, provided that each amendment shall be duly executed in writing by the Trustees and annexed hereto. The Trustees shall have full discretion to fix the effective date of any amendment.

**Article XI**  
**Termination of Trust**

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*Section 1. BY THE TRUSTEES.* This Agreement and Declaration of Trust may be terminated by an instrument in writing executed by the Trustees when there is no longer in force and effect an agreement for the receipt and distribution of remuneration which is accepted for administration by the Fund.

*Section 2. PROCEDURE ON TERMINATION.* In the event of the termination of this Agreement and Declaration of Trust, the Trustees shall apply the Fund to pay or to provide for the payment

of any and all obligations of the Fund and shall distribute and apply any remaining surplus in such a manner as will in their opinion best effectuate the purpose of the Fund; provided, however, that no part of the corpus or income of said Fund shall be used for or diverted to purposes other than for the benefit of the artists eligible for benefits under the agreements for the receipt and distribution of remuneration administered by the Fund, or the administrative expenses of the Fund or other payments in accordance with the provisions of the Fund.

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*Section 3. NOTIFICATION OF TERMINATION.* Upon termination of the Fund, the Trustees shall notify each necessary party, and the Trustees shall continue as Trustees for the purpose of winding up the affairs of the Trust.

## **Article XII** **Miscellaneous Provisions**

*Section 1. GOVERNING LAW.* This Agreement and Declaration of Trust shall be construed under the laws of the State of New York applicable to contracts made and to be performed within the County and State of New York (without regard to any conflict of laws provision), and venue for any dispute arising under this Agreement and Declaration of Trust shall be in New York.

*Section 2. NOTIFICATION TO TRUSTEES.* The address of each of the Trustees shall be that stated on the signature page of this Agreement and Declaration of Trust. Any change of address shall be effected by written notice to the Trustees.

*Section 3. SEVERABILITY.* Should any provision in this Trust Agreement or in the rules and regulations adopted thereunder be deemed or held to be unlawful or invalid for any reason, such fact shall not adversely affect the provisions contained therein unless such illegality shall make impossible or impractical the functioning of the Trust and the Plan, and in such case the appropriate parties shall immediately adopt a new provision to take the place of the illegal or invalid provision.

*Section 4. VESTED RIGHTS.* No artist or any person claiming by or through such artist, including the artist's family, dependents, beneficiary and/or legal representative, shall have any right, title or interest in or to the Fund or any property of the Fund or any part thereof except as may be specifically determined by the Trustees.

*Section 5. ENCUMBRANCE OF PAYMENTS.* No moneys, property or equity, of any nature whatsoever, in the Fund, or policies or benefits or moneys payable therefrom, shall be subject in any manner by any artist or person claiming through such artist to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, garnishment, mortgage, lien or charge, and any attempt to cause the same to be subject thereto shall be null and void.

*Section 6. EXPENSES OF THE TRUSTEES.* All expenses of the Trustees incurred in the performance of their duties may be chargeable to the Fund at the discretion of the Trustees. All other expenses incurred pursuant to Article IV hereof shall be paid by the Fund.

*Section 7. NO EMPLOYER CONTRIBUTIONS PERMITTED.* The Fund shall not accept contributions from any employer or association of employers who employ artists represented by the AFM or SAG-AFTRA, and shall not enter into agreements for the receipt and distribution of remuneration with

such employers or associations of employers.

IN WITNESS HEREOF, in accordance with Article X, the Trustees sign this Agreement and Declaration of Trust, which amends and restates the original agreement and declaration of trust. The Trustees, by affixing their signatures at the end of this Agreement and Declaration of Trust, agree to accept the trusteeship and act in their capacity strictly in accordance with the provisions of this Agreement and Declaration of Trust.

Raymond M. Hair, Jr., AFM  
1501 Broadway, Suite 600  
New York, NY 10036

Duncan Crabtree-Ireland, SAG-AFTRA Date  
5757 Wilshire Boulevard, 7<sup>th</sup> Floor  
Los Angeles, CA 90036

Sam Folio, AFM  
1501 Broadway, Suite 600  
New York, NY 10036

Stefanie Taub, SAG-AFTRA  
5757 Wilshire Boulevard, 7<sup>th</sup> Floor  
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Jon Joyce, SAG-AFTRA  
5757 Wilshire Boulevard, 7<sup>th</sup> Floor  
Los Angeles, CA 90036

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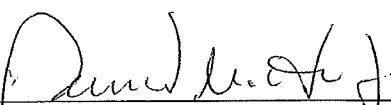
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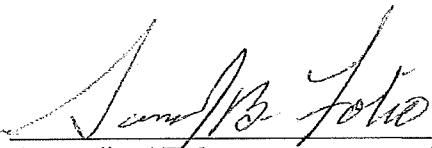
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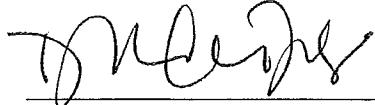
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Raymond M. Hair, Jr., AFM Date  
1501 Broadway, Suite 600 11/15/12  
New York, NY 10036

  
Sam Folio, AFM Date  
1501 Broadway, Suite 600  
New York, NY 10036

  
Bruce Bouton, AFM Date  
1501 Broadway, Suite 600  
New York, NY 10036

  
Duncan Crabtree-Ireland, SAG-AFTRA Date  
5757 Wilshire Boulevard, 7<sup>th</sup> Floor  
Los Angeles, CA 90036 1/16/13

Stefanie Taub, SAG-AFTRA Date  
5757 Wilshire Boulevard, 7<sup>th</sup> Floor  
Los Angeles, CA 90036

Jon Joyce, SAG-AFTRA Date  
5757 Wilshire Boulevard, 7<sup>th</sup> Floor  
Los Angeles, CA 90036

**RESOLUTION TO AMEND AGREEMENT AND DECLARATION OF TRUST**  
**TO PROVIDE FOR ALTERNATE TRUSTEES**

WHEREAS, the Agreement and Declaration of Trust of the AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund, as Amended and Restated on July 26, 2012, ("Agreement and Declaration of Trust") does not provide for Alternate Trustees; and

WHEREAS, an expansion of the Board of Trustees to include the option to appoint Alternate Trustees will be beneficial for the efficient operation of the Board of Trustees; and

WHEREAS, Article X, Section 1 authorizes the Trustees to amend the Agreement and Declaration of Trust and to fix the effective date of the amendment;

NOW BE IT THEREFORE RESOLVED that, effective July 27, 2015, Article III of the Agreement and Declaration of Trust shall be amended to read as follows:

**Article III**  
**Trustees**

*Section 1. AFM AND SAG-AFTRA TRUSTEES.* The operation and administration of the Fund shall be the joint responsibility of six Trustees, three appointed by the AFM, of which no fewer than one shall be a rank-and-file representative, and three appointed by SAG-AFTRA, of which no fewer than one shall be a rank-and-file representative.

*Section 2. AFM AND SAG-AFTRA ALTERNATE TRUSTEES.* The AFM and SAG-AFTRA shall each have the option of appointing up to two Alternate Trustees. Alternate Trustees shall not be empowered to vote on any matter except in the event that one or more Trustees (i) abstain from voting on any matter before the Board of Trustees due to a conflict of interest or (ii) are absent from a meeting. In such a case, the Alternate Trustee shall be entitled to the vote otherwise exercised by the abstaining or absent Trustee(s) and shall be entitled to take any other discretionary action on the matter without the involvement of the conflicted or absent Trustee(s). When acting in the place of a Trustee, the powers, duties, responsibilities and protections of a Trustee described in this Agreement and Declaration of Trust shall apply to the Alternate Trustee. An Alternate Trustee's expenses may be chargeable to the Fund in accordance with Article XII, Section 6 only when the Alternate Trustee attends a meeting or otherwise acts in the place of a Trustee.

*Section 2. TERM OF TRUSTEES.* Each Trustee or Alternate Trustee shall continue to serve as such until his or her death, incapacity, resignation, or removal by the appointing Union. Each Union may remove or replace its Trustee or Alternate Trustee at will.

*Section 3. SUCCESSOR TRUSTEES.* Each Union shall appoint its successor Trustees or Alternate Trustees.

*Section 4. FORM OF NOTIFICATION.* In case any Trustee or Alternate Trustee shall be removed, replaced, or succeeded, a statement in writing by the relevant Union shall be sufficient evidence of its action, when forwarded to the Fund and to the remaining Trustees and Alternate

Trustees. Any resignation shall be evidenced in writing and forwarded by registered mail to the Fund and the remaining Trustees and Alternate Trustees, and in the case of a Trustee, shall not be effective for two months following the date of mailing unless a successor Trustee has been appointed.

Approved and executed this 27<sup>th</sup> day of July 2015.



Raymond M. Hair, Jr., AFM  
1501 Broadway, Suite 600  
New York, NY 10036

Date

7/27/15



7/27/15

Duncan Crabtree-Ireland, SAG-AFTRA Date  
5757 Wilshire Boulevard, 7<sup>th</sup> Floor  
Los Angeles, CA 90036



Sam Folio, AFM Date

1501 Broadway, Suite 600  
New York, NY 10036

Stefanie Taub, SAG-AFTRA Date

5757 Wilshire Boulevard, 7<sup>th</sup> Floor  
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7/27/15



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7/27/15